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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~307~~ 156

JOSIAH M. MILLS AND FLORA M. MILLS, PLAINTIFFS IN ERROR,

vs.

NATHANIEL SMITH.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED DECEMBER 2, 1867.

SUPREME COURT OF THE UNITED STATES.

No. 307.

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1 Pleas in the Circuit Court of the United States for the northern district of Illinois, held at the United States court-room, in the city of Chicago, in the district aforesaid, before the Hon. Thomas Drummond, district judge of said district, and in the absence pro-tempore of the Hon. David Davis, one of the justices of the Supreme Court of the United States, sole judge of said Circuit Court, on Tuesday, the twenty-seventh day of June, in the adjourned May term of said court, in the year of our Lord one thousand eight hundred sixty-five, and of our independence the eighty-ninth year.

WM. H. BRADLEY, *Clerk*.

JOSIAH M. MILLS and FLORA M. MILLS
vs.
NATHANIEL SMITH.

NORTHERN DISTRICT OF ILLINOIS:

Be it remembered that on the twenty-fourth day of January, in the year of our Lord one thousand eight hundred and sixty-
2 one, came said Josiah M. Mills & Flora M. Mills, plaintiffs, by their attorney, and filed in the office of the clerk of the Circuit Court of the United States for the northern district of Illinois, at Chicago, in said district, their declaration in ejectment against Nathaniel Smith, defendant, together with a notice and affidavit thereto attached; and also at the same time filed their bond for costs in said entitled cause, which said bond, declaration, notice, and affidavit are in the words and figures following, to wit:

Circuit Court.—December term, A. D. 1861.

Bond for costs.

JOSIAH M. MILLS and FLORA M. MILLS
vs.
NATHANIEL SMITH.
In ejectment.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

I enter myself security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action, or
3 to any of the officers of this court, and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by them, hereby agree and stipulate that execution may issue against my property for any costs taxed against them.

Dated this twenty-fourth day of January, A. D. 1861.

E. S. SMITH.

Endorsed: Filed this twenty-fourth day of January, A. D. 1861. Wm. H. Bradley, clerk.

United States Circuit Court for the northern district of Illinois.

Declaration.

JOSIAH M. MILLS and FLORA M. MILLS
vs.
NATHANIEL SMITH. } In ejectment.

NORTHERN DISTRICT OF ILLINOIS, *ss*:

Josiah M. Mills & Flora M. Mills, wife of the said Josiah, by E. S. Smith & Co., their attorneys, complain of Nathaniel Smith, for that whereas the said Flora M. Mills, on the tenth day of August, in the year of our Lord one thousand eight hundred and fifty-six, was possessed, and for that the said Josiah M. Mills, on the day and year aforesaid, in his right as tenant by curtesy, was possessed of a
4 certain messuage or tract of land situate in the county of Stark and State of Illinois, and known and described as follows:

The south half ($\frac{1}{2}$) of section thirty-six, (36,) township twelve (12) north of range seven (7) east, containing three hundred and twenty acres, which said premises the said Flora M. Mills claims in fee, and being so possessed thereof the defendant, afterwards, on the day and year last above-mentioned, entered into the said premises and ejected the said plaintiffs, and withheld, and still unlawfully withholds, from the said Flora M. Mills the possession thereof, to her damage the sum of ten thousand dollars, and therefore the plaintiffs bring their suit.

E. S. SMITH & CO., *Pl'ff's Att'ys.*

5 United States Circuit Court for the northern district of Illinois.

Notice in ejectment.

JOSIAH M. MILLS *et ux.*
vs.
NATHANIEL SMITH. }

NORTHERN DISTRICT OF ILLINOIS, *ss*:

Please take notice that the subjoined declaration will be filed in the above named court on 24th day of January, Anno Domini 1861; also that [that] upon filing the same a rule will be entered requiring you to appear and plead to such delaration within twenty days after the entry of such rule, and that if you neglect so to appear and plead, a judgment will be entered against you, and the plaintiff will recover possession of the premises.

E. S. SMITH & CO., *Pl'tiff's Att'ys.*

To Nathaniel Smith, Defendant.

STATE OF ILLINOIS, *Stark Coun y, ss*:

Oliver Whitaker, being duly sworn on oath, says that he served a copy of the within declaration and notice on Nathaniel Smith, the defendant, on the 19th day of January, Anno Domini, 1861.

OLIVER WHITAKER.

Sworn and subscribed before me, Patrick M. Blair, clerk of the Circuit Court, in and for the county of Stark and State of Illinois, this twenty-second day of January, A. D. 1861.

[SEAL.] PATRICK M. BLAIR.

6 Endorsed: Filed Jan'y 24th, 1861. Wm. H. Bradley, cl'k

On the same day, to wit, the 24th of January, A. D. 1861, in the December term, A. D. 1860, of said court, in the record of the proceedings thereof in said entitled cause, is the following entry, to wit:

JOSIAH M. MILLS and FLORA M. MILLS
vs.
NATHANIEL SMITH. } Ejectment.

Now come the plaintiffs by E. S. Smith & Co., their attorneys, who file their declaration in ejectment against the said defendant, together with a notice thereto attached, and also an affidavit of due service of a true copy of said declaration and notice upon the defendant, and on motion of the plaintiffs' attorneys, it is ordered by the court that this cause be docketed, and that the defendant be hereby ruled to plead within twenty days, or that his default be entered.

On this day, to wit, the 25th day of January, A. D. 1861, came said defendant by his attorney and filed in said Circuit Court his demurrer in said entitled cause, which said demurrer is in the words and figures following, to wit:

7 *Demurrer.*

In the Circuit Court of the United States, northern district of Illinois.

JOSIAH M. MILLS and FLORA M. MILLS
vs.
NATHANIEL SMITH. } Ejectment.

And now comes the said defendant and says that the plaintiff's declaration, and the matters and things therein contained, are not sufficient in law for the plaintiffs to have and maintain their action aforesaid against the said defendant, and that he is not bound in law to answer the same, and this he is ready to verify; wherefore he prays judgment, &c.

N. H. PURPLE,
Def't's Att'y.

Endorsed: Filed Jan'y 25, 1861. Wm. H. Bradley, cl'k.

Stipulation.

On this day, to wit, the 26th day of January, A. D. 1861, came said defendant, by his attorney, and filed in said clerk's office
8 his stipulation in said entitled cause, which said stipulation is in the words and figures following, to wit:

In the Circuit Court of the United States for the northern district of Illinois.—December term, 1861.

JOSIAH M. MILLS, FLORA M. MILLS
vs.
NATHANIEL SMITH. } Ejectment.

It is stipulated that the plaintiff may file an amended declaration in this cause; that the defendant may file his plea herein, and that this cause be continued until July term, A. D. 1861.

January 26th, 1861.

N. H. PURPLE,
Def't's Att'y.
E. S. SMITH,
Plaintiff's Att'y.
Per ROBERTS.

Endorsed: Filed Jan'y 26, 1861. Wm. H. Bradley, cl'k.

On this day, to wit, the 26th day of January, A. D. 1861, came said plaintiff's, by their attorney, and filed in said clerk's office their amended declaration in said entitled cause, which said amended declaration is in the words and figures following, to wit:

9 *Amended declaration.*

Cir. Court of the United States for the seventh circuit and northern district of Illinois.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

JOSIAH M. MILLS and FLORA M. MILLS
vs.
NATHANIEL SMITH.

Josiah M. Mills and Flora M. Mills, wife of the said Josiah, of Newaygo, in the county of Newaygo, who are citizens of the State of Michigan, plaintiff's, by E. S. Smith, their attorney, complain of Nathaniel Smith, of Stark county, Illinois, who is a citizen of the State of Illinois, residing in said district, defendant in this suit, in a plea of ejectment.

For that whereas the said Flora M. Mills, who is the wife of said Josiah, on the tenth day of August, A. D. 1856, was pos-
10 sessed, and for that the said Josiah M. Mills, on the day and year aforesaid was possessed in the right of his wife, the said Flora, of a certain messuage and tract of land situate in the county of Stark, State of Illinois, known and described as follows, to wit:

The south-half of section thirty-six (36,) township twelve (12) north of range seven (7) east, containing three hundred and twenty acres, of the value of three thousand dollars, which said premises the said Flora M. Mills claims in fee; and the said plaintiffs being so possessed thereof, the said defendant afterwards, on the tenth day of

August, A. D. 1856, entered into the said premises and ejected the said plaintiffs therefrom, and withheld, and still unlawfully withholds, from them the possession thereof.

And also for that whereas afterwards, to wit, on the tenth day of August, A. D. 1856, the said plaintiffs were, and ever since have been, intermarried, and were possessed in the right of said plaintiff, Flora M. Mills, of all that certain tract of land situate in Stark county, Illinois, known and described as follows: The south-half of section thirty-six (36,) township twelve (12) north of range seven (7) east, containing three hundred and twenty acres, of the value of three thousand dollars, which said premises the said Flora M. Mills claims in fee, and the said plaintiffs, intermarried as aforesaid. Afterwards, to wit, on the tenth day of August, A. D. 1856, the defendant entered into the said premises and ejected the said plaintiffs therefrom, and withheld, and still unlawfully withholds, from
11 the plaintiffs the possession thereof, to their damage, five thousand dollars, and therefore they bring their suit.

E. S. SMITH,
Pl'tiff's Att'y.

Endorsed: Filed Jan'y 26, 1861. Wm. H. Bradley, cl'k.

Plea.

On this day, to wit, the 26th day of January, A. D. 1861, came said defendant, by his attorney, and filed in said clerk's office his plea in said entitled cause, which said plea is in the words and figures following, to wit:

In the Circuit Court of the United States for the northern district of Illinois.—December term, 1861.

JOSIAH M. MILLS and FLORA M. MILLS
vs.
NATHANIEL SMITH.

And now comes the defendant, and for plea says that he is not guilty of unlawfully withholding the possession of the premises in the said plaintiffs' declaration mentioned in manner and form
12 as stated in the plaintiffs' declaration mentioned, and of this he puts himself upon the country, &c.

N. H. PURPLE,
Def't's Att'y.

Endorsed: Filed January 26, 1861. Wm. H. Bradley, clerk.

On this day, to wit, the 13th day of January, A. D. 1862, in the December term, A. D. 1861, of said court, in the record of the proceedings thereof in said entitled cause, is the following entry, to wit:

JOSIAH M. MILLS and FLORA M. MILLS
vs.
NATHANIEL SMITH. } Ejectment.

Now come the parties by their attorneys, and thereupon the ex-

ception of the defendant, filed to the depositions of William F. Lacy and Daniel B. Beers are overruled; and thereupon, on issue joined, come a jury of good and lawful men, to wit: Thomas B. Talcott, R. W. Carson, Abel Proctor, A. H. Hoge, John Wilson, A. J. Hodges, A. Hurlbut, J. D. Brown, A. H. Head, Duncan Ferguson, Thomas Webster, and C. S. Marshall, who are all duly elected, tried,
13 and sworn to well and truly try the issue in this behalf. After hearing a part of the evidence, the plaintiff, by leave of the court, withdraws a juror, and the panel is discharged from the further consideration of said cause, and the cause continued upon the payment by the plaintiffs of all the costs accrued to this date.

On this day, to wit, the 24th day of July, A. D. 1862, in the July term, A. D. 1862, of said court, in the record of the proceedings thereof, in said entitled cause, is the following entry, to wit:

JOSIAH M. MILLS and FLORA M. MILLS
vs.
NATHANIEL SMITH. } Ejectment.

Now come the parties by their attorneys, and upon issue joined upon the plea of the defendant, heretofore filed herein, thereupon come a jury of good and lawful men, to wit: A. T. Sherman, C. C. Royce, John A. Flagg, J. D. Stevenson, Wm. H. Barry, Andrew Gross, Richard Harvey, John Brown, H. M. Boggers, C. J. Wyeth, L. M. Blaisdell, and William A. Little, who were duly elected, tried, and sworn to try said issue; and having heard the evidence,
14 and a part of the arguments of counsel, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

On this day, to wit, the 25th day of July, A. D. 1862, in the July term, A. D. 1862, of said court, in the record of the proceedings thereof in said entitled cause, is the following entry, to wit:

JOSIAH M. MILLS and FLORA M. MILLS
vs.
NATHANIEL SMITH. } Ejectment.

Now come again the parties by their attorneys, and now come also the jury heretofore empannelled herein, and having heard the concluding arguments of counsel, and receiving instructions from the court, they retired to consider of their verdict; and after a short absence, return into court the following verdict, to wit: We, the jury, find the defendant not guilty of unlawfully withholding from the possession of the plaintiff the real estate and premises described
15 in his declaration. And the plaintiffs, by their attorney, move the court for a new trial herein.

On this day, to wit, the 4th day of August, A. D. 1862, in the July term, A. D. 1862, of said court, in the record of the proceedings thereof, in said entitled cause, is the following entry, to wit:

JOSIAH M. MILLS and FLORA M. MILLS
vs.
NATHANIEL SMITH. } Ejectment.

Now come the plaintiffs, by their attorney, and call up for disposition the motion heretofore entered by them, by their attorney, for a new trial in this cause; and the court, after hearing the argument on the part of the plaintiff, and not being sufficiently advised, takes time to consider.

On this day, to wit, the 5th day of February, A. D. 1863, in the December term, A. D. 1862, of said court, in the record of the proceedings thereof, in said entitled cause, is the following entry, to wit:

16 JOSIAH M. MILLS and FLORA M. MILLS
vs.
NATHANIEL SMITH. } Ejectment.

The court having considered, and being now fully advised on the motion of the plaintiffs for a new trial herein, overrules the same, and awards judgment on the finding of the jury in this behalf.

It is thereupon considered by the court that the defendant go hence without day, and that he have and recover of the plaintiffs the costs and charges herein by him expended in and about his said defence, amounting to the sum of forty-two dollars and ninety-five cents, and that he have execution therefor.

On this day, to wit, the 23d day of June, A. D. 1863, in the May term, A. D. 1863, of said Court, in the record of the proceedings thereof, in said entitled cause, is the following entry, to wit:

JOSIAH M. MILLS and FLORA M. MILLS
vs.
NATHANIEL SMITH. } Ejectment.

17 Now come the plaintiffs, by E. S. Smith, esq., their attorney, and moves the court to vacate and set aside the judgment entered herein on the fifth day of February, A. D. one thousand eight hundred and sixty-three, and for a new trial of the same, under the statute; and it appearing to the court that all the taxed costs had been paid by the plaintiffs, thereupon it is ordered by the court that said judgment be vacated and set aside, the cause re-instated upon the docket, and a new trial thereof awarded; and on further motion, leave is given the plaintiffs to cross-examine B. Lombard, jr., esq., before Geo. C. Lanpliere, esq., at Galesburg, Illinois, whose deposition, de bene esse, has been taken and filed on the part of the defendant in this cause.

On this day, to wit, the 6th day of October, A. D. 1863, in the October term, A. D. 1863, of said court, in the record of the proceedings thereof, in said entitled cause, is the following entry, to wit:

JOSIAH M. MILLS and FLORA M. MILLS
v.
NATHANIEL SMITH. } Ejectment.

18 Now come the plaintiffs, by E. S. Smith, esq., their attorney, and move the court for a rule on the defendant to produce the original deed from Seba Parmly to Edwin A. Lacy, produced by Judge Purple on a former trial of this cause, within five days after service of a copy of this order on him, or show cause to the contrary.

On this day, to wit, the 9th day of November, A. D. 1863, in the October term, A. D. 1863, of said court, in the record of the proceedings thereof, in said entitled cause, is the following entry, to wit:

JOSIAH M. MILLS and FLORA M. MILLS
vs.
NATHANIEL SMITH. } Ejectment.

Now come the parties, by their attorneys, and the defendant, in response to the rule heretofore entered against him to produce the original deed from Zeba Parmly to Edwin A. Lacy, having filed affidavits, and the court having fully considered the same, orders that said defendant deposite with the clerk of this court the deed
19 above-referred, to remain in his custody until the further order of the court.

On this day, to wit, the 9th day of December, A. D. 1863, in the October term, A. D. 1863 of said court, in the record of the proceedings thereof, in said entitled cause, is the following entry, to wit:

JOSIAH M. MILLS and FLORA M. MILLS
vs.
NATHANIEL SMITH. } Ejectment.

The motion of the plaintiffs, by their attorney heretofore made, that the deed deposited in court by the defendant's attorney, H. M. Weed, esq., of Zeba Parmly to Edwin A. Lacy, of date February the eleventh, A. D. one thousand eight hundred and thirty-seven, be attached to a commission to be issued in this case to Nelson Taylor, of Danbury, to take the deposition of Zeba Parmelee and Bryant Smith, is sustained and leave given to the clerk to attach said original deed to such commission, upon filing a certified copy of the same in the cause.

On this day, to wit, the 25th day of January, A. D. 1864, in
20 the December term, A. D. 1863, of said court, in the record of the proceedings thereof, in said entitled cause, is the following entry, to wit:

JOSIAH M. MILLS and FLORA M. MILLS
vs.
NATHANIEL SMITH. } Ejectment.

This cause, on motion and stipulation filed, is continued to the next May term of this court.

On this day, to wit, the 10th day of January, A. D. 1865, in the December term, A. D. 1864, of said court, in the record of the proceedings thereof, in said entitled cause, is the following entry, to wit:

JOSIAH M. MILLS and FLORA M. MILLS, his wife, *vs.* NATHANIEL SMITH. } Ejectment.

This cause having been this day called for trial, now comes the defendant, by H. M. Weed, esq., his attorney, and on his motion, the plaintiffs and their attorney are each three times solemnly
21 called, and come not, but make default, it is thereupon ordered by the court, on motion of the defendant's attorney, that this cause be dismissed at the costs of the plaintiffs for want of prosecution.

It is thereupon considered and adjudged by the court, that the said defendant do have and recover of and from the said plaintiffs his costs and charges by him about his defence in this behalf expended, amounting to the sum of fifteen dollars and eighty-five cents, and that he have execution therefor.

On this day, to wit, the 25th day of January, A. D. 1865, in the December term, A. D. 1864, of said court, in the record of the proceedings thereof, in said entitled cause, is the following entry, to wit:

JOSIAH M. MILLS and FLORA M. MILLS, his wife, *vs.* NATHANIEL SMITH. } Ejectment.

Now comes on to be heard the motion of the plaintiff, heretofore filed herein, to set aside and vacate the order of default and dismissal, entered in this cause, on the tenth day of January instant,
22 and to reinstate said cause upon the docket; and the court, after hearing the affidavits on the part of the plaintiffs, and the arguments of counsel, sustains said motion, upon the payment, on the part of the plaintiffs, of all the taxed costs herein, including a docket fee of ten dollars, and also twenty-five dollars and fifty cents, the necessary expenses of the defendant's counsel, Judge Weed, in coming here to try this cause.

On this day, to wit, the 22nd day of May, A. D. 1865, on the May term, A. D. 1865, of said court, in the record of the proceedings thereof, in said entitled cause, is the following entry, to wit:

JOSIAH M. MILLS and FLORA M. MILLS *vs.* NATHANIEL SMITH. } Ejectment.

Now come the parties by their attorney, and upon issue joined, thereupon come a jury of good and lawful men, to wit, William R.

West, Jonathan F. Cole, Samuel S. Kaysbeer, D. H. Hammer, Daniel Mason, Walter P. Hunt, Alfred Knowles, Joel W. Hopkins,
23 D. W. Dawley, Phineas Cheney, Edward Kipp, and Claudius B. French, who were all duly elected, tried and sworn to well and truly try said issue; and after proceedings in the trial of the cause until the hour of adjournment, without concluding the same, the further trial of the cause is postponed until to-morrow morning.

On this day, to wit, the 23d day of May, A. D. 1865, in the May term, A. D. 1865, of said court, in the record of the proceedings thereof, in said entitled cause, is the following entry, to wit:

JOSIAH M. MILLS and FLORA M. MILLS
vs.
NATHANIEL SMITH. } Ejectment.

Now come again the parties, by their attorneys, and come also the jury in this behalf empanneled and sworn, and after hearing the concluding evidence and a part of the arguments of counsel, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

24 On this day, to wit, the 24th day of May, A. D. 1865, in the May term, A. D. 1865, of said court, in the record of the proceedings thereof, in said entitled cause, is the following entry, to wit:

JOSIAH M. MILLS and FLORA M. MILLS
vs.
NATHANIEL SMITH. } Ejectment.

Now come again the parties, by their attorneys, and come also the jury in this behalf empanneled and sworn, and after hearing the concluding arguments of counsel, and receiving the instructions of the court, the jury retire to consider of their verdict; and by agreement of the parties, by their attorneys, the jury, when they shall have agreed upon a verdict, may sign and seal the same, and deliver it to the clerk and disperse.

On this day, to wit, the 25th day of May, A. D. 1865, in the May term, A. D. 1865, of said court, in the record of the proceedings thereof, in said entitled cause, is the following entry, to wit:

25 JOSIAH M. MILLS, FLORA M. MILLS,
vs.
NATHANIEL SMITH. } Ejectment.

Now come again the parties, by their attorneys, and the jury having returned into court their sealed verdict, wherein they say, we, the jury, find the defendant not guilty; and thereupon the plaintiffs, by their attorney, move the court for a new trial herein.

On this day, to wit, the 27th day of June, A. D. 1865, in the May term, A. D. 1865, of said court, in the record of the proceedings thereof, in said entitled cause, is the following entry, to wit:

JOSIAH M. MILLS and FLORA M. MILLS
vs.
NATHANIEL SMITH. } Ejectment.

The court having considered, and being now fully advised upon, the motion of the plaintiffs heretofore entered herein for a new trial of this cause, overrules said motion, and awards judgment upon the finding of the jury. It is thereupon considered and
26 adjudged by the court, that the said defendant be dismissed, and that he go hence without day, and that he have and recover of the plaintiffs his costs and charges by him about his defence in this behalf expended, amounting to the sum of thirty-two dollars and forty-cents, and that he have execution therefor.

On the hearing of said cause the following exceptions were taken and allowed.

27 United States Circuit Court for the northern district of Illinois.

Bill of exceptions.

JOSIAH M. MILLS, FLORA M. MILLS,
vs.
NATHANIEL SMITH. } Ejectment.

Be it remembered, that on the trial of this suit, at the May term of this court, in the year eighteen hundred and sixty-five, the said plaintiffs, Josiah M. Mills and Flora M. Mills, to maintain the issue on their part, offered and gave in evidence to the jury the patent from the United States to Ziba Parmalee, which said patent is in words and figures as follows, to wit:

28 James Monroe, President of the United States of America, to all to whom these presents shall come, greeting:

Know ye, that in pursuance of the acts of Congress appropriating and granting land to the late army of the United States, passed on and since the sixth day of May, 1812, Ziba Parmely having deposited in the General Land Office a warrant in his favor, numbered 530, there is granted unto the said Ziba Parmely, late a private in Tilden's comp'y, 37 reg't of infantry, a certain tract of land, containing three hundred and twenty acres, being the south half of section thirty-six, of township twelve north, in range seven east, in the tract appropriated (by the acts aforesaid) for military bounties in the Territory of Illinois, to have and to hold the said quarter section of land, with the appurtenances thereof, unto the said Ziba Parmely, and to his heirs and assigns forever.

In testimony whereof, I have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, this twenty-
29 ninth day of July, in the year of our Lord one thousand eight

hundred and eighteen, and of the independence of the United States of America the forty-third.

By the President, J. M.

J. MEIGS,
Commissioner of the General Land Office.

GENERAL LAND OFFICE,
July 19th, 1861.

In accordance with the seventh section of the act of Congress, approved the 4th of July, 1836, entitled "An act to reorganize the General Land Office," and with the act of Congress, approved the 3d of March, 1843, entitled "An act in relation to the exemplifications of the records of land patents and other evidences of title, and amendatory of the act entitled 'An act to reorganize the General Land Office,'" I, James M. Edmunds, Commissioner of the General Land Office, do hereby certify that the annexed is a true and literal exemplification of page 146, vol. 26, Illinois Bounty Land Records, on file in this office. The record of the patent in this case, of which the annexed is a literal exemplification as aforesaid, was omitted to be signed as required by law, as appears from the record of the same in this office; but the 1st section of the act of March 3d, 1843, above referred to, provides that "where such exemplifications are adduced in evidence, they shall be deemed and held to be of the same validity in all proceedings, whether at law or in equity, as if the names of the officers signing and countersigning the same had been fully inserted in such record."

In testimony whereof, I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year first above written.

[SEAL.] J. M. EDMUNDS,
Commissioner of the General Land Office.

30 The plaintiffs, to further maintain the issue on their part, offered and gave in evidence to the jury the deed from Ziba Parmalee to Edwin A. Lacey, which deed was never recorded, and also, in connection with said deed, to prove the acknowledgment and delivery of the same, the depositions of Ziba Parmalee and Bryant Smith, which said deed and depositions are as follows: (This is the deed marked "Exhibit A," attached to Zeba Parmalee's deposition.)

Exhibit A.

Know all men by these presents, that I, Zeba Parmely, of Newtown, in the county of Fairfield, and State of Connecticut, for the consideration of thirty dollars, received to my full satisfaction, of Edwin A. Lacy, of Brookfield, in s'd county, do by by these presents remise, release, and forever quit claim unto the said Edwin A. Lacey, all right, title, interest, claim, and demand whatever, which I, the said releasor, have or ought to have in to [to] a certain tract of land, situate and lying in the State of Illinois, and described as follows,

to wit: Containing three hundred and twenty acres, being the south half of section thirty-six, of township twelve north, in range seven east, in the tract appropriated by the acts of Congress passed on and since the 6th day of May, A. D. 1812, for military boun-
31 ties in the State of Illinois; the above-described tract of land being the same conveyed to me by deed, dated the 29th day of July, A. D. 1818, and signed by James Monroe, then President of the United States of America, and countersigned by Josiah Meigs, Comns't of General Office, to the same for a more particular description; to have and to hold the premises, with all the appurtenances, unto the said releassee, his heirs and assigns forever, so that neither I, the said releasor, nor my heirs, nor any other person under me or them, shall hereafter have any claim, right, or title in or to the premises, or any part thereof; but therefrom I and they are by these presents forever barred and secluded.

In witness whereof, I have hereunto set my hand and seal the 11th day of February, A. D. 1837.

his
ZIBA + PARMILY.
mark.

Signed, sealed, and delivered in presence of—
GEORGE P. HURD,
BRYANT SMITH.

BROOKFIELD, *Feb'y 11th*, 1837.

FAIRFIELD COUNTY, *ss:*

Personally appeared Zeba Parmilee, signer and sealer of the
32 foregoing instrument, and acknowledged the same to be his free act and deed, before me.

BRYANT SMITH,
Justice of the Peace.

STATE OF CONNECTICUT, *Fairfield County, ss:*

I, Henry T. Beake, assistant clerk of the Superior Court in and for said county, the same court being a court of record, do hereby certify that Bryant Smith was on the eleventh (11th) day of February, A. D. 1837, and before and after that time, a justice of the peace in and for said county and State aforesaid, and that all his acts as such are entitled to full faith and credit.

Witness my hand and the seal of said court, at Bridgeport, this 27th day of December, A. D. 1861.

[SEAL.] HENRY T. BEAKE.

Deposition of Z. Parmalee.

UNITED STATES OF AMERICA, *Northern district of Illinois, ss:*

Interrogations to be administered to Zeba Parmalee, of Newtown, in the county of Fairfield, and State of Connecticut, a witness to
33 be produced, sworn, and examined under and by virtue of the annexed commission, before Nelson Taylor, esquire, in a certain cause now pending and undetermined in said Circuit Court, wherein Josiah M. Mills and Flora M. Mills are plaintiffs, and Nathaniel Smith is defendant, on the part and behalf of said plaintiffs, as follows, to wit:

DANBURY, *August 12th*, 1864.

STATE OF CONNECTICUT, *Fairfield County, ss:*

Ziba Parmeley, of Newtown, in said county, of lawful age, being duly cautioned and sworn, doth depose and say, in answer to the direct and cross-interrogatories above written, as follows:

Interrogatory first. What is your name, age, occupation, and place of residence?

Answer. My name is Ziba Parmely; my age is seventy-two years; my occupation is a farmer; my residence is in Newtown, Fairfield county, Connecticut.

Interrogatory second. Do you know the parties, plaintiff and defendant, in the caption to these interrogatories mentioned, or either, and which of them, and how long have you known them respectively?

34 Answer. I know Flora M. Mills, that was formerly Flora M. Lacey, wife of Edwin A. Lacey, formerly of Brookfield, in said county, dec'd. I was first acquainted with the said Flora M. Mills as early as prior to 1830, and continued to be acquainted with her until some time after 1850. I have no acquaintance with Josiah M. Mills or Nathaniel Smith, the other parties.

Interrogatory third. Did you ever execute the deed hereto annexed, marked "Exhibit A?"

Answer. I did execute the deed, marked "Exhibit A," and delivered the same to Edwin A. Lacey, the person named in the deed.

Interrogatory fourth. Is the signature or mark affixed to said deed your signature or mark?

Answer. It is my mark.

Interrogatory fifth. Did you acknowledge said deed in manner and form as set forth in the certificate of acknowledgment endorsed thereon? and did you deliver the same, after its being signed, sealed, and acknowledged, to Edwin A. Lacey, the grantee therein named?

Answer. I did acknowledge said deed, marked "Exhibit A," and delivered the same, after signing, sealing, and acknowledging the same, to Edwin A. Lacey, the grantee therein named.

Interrogatory sixth. In a deposition which you gave in this
35 case on the 20th day of April, 1861, you say that some 20 or 25 years previous to that time you sold and conveyed the land described in said deed to Edwin A. Lacey, and gave him the warrant you had obtained for the same from the United States gov-

ernment, but that you never executed to him, said Lacey, any deed for said lands. Please state what you now remember as to the giving a deed, and in what particulars you desire to correct your former testimony.

Answer. I remember of giving to Edwin A. Lacey a deed of my land in Illinois, and when I testified before, I had forgotton of giving more than one paper to Mr. Lacy. I did recollect that I gave him the patent that I received of the government for the land, and thought then that may have been all I gave him. I did not at that time recall to my mind, from the lapse of time, the circumstances; and besides, it was represented to me some time previous, by a man calling himself Lombard, that there was no deed from me to Lacey upon record, which led me to think that I only gave him the government deed. Upon examining "Exhibit A," and calling the circumstances to my mind, I am satisfied I was mistaken in what I then said in regard to not giving him a deed for the land.

36 Interrogatory seventh. Do you know of any other matter or thing which may tend to benefit the plaintiffs in this suit? If yea, state every particular.

Answer. Sometime in 1854, a stranger called on me, at my residence in Newtown, Fairfield county, Connecticut, and said his name was Lombard. He asked me if I was a soldier in the war of 1812. I told him I was. He said he was looking up old soldiers. He said to me that the town where the land lay wanted to get a deed from me for the land, which was my soldier's right, and the town had agreed to give seventeen dollars a head for a deed to the old soldiers. He also said that the redemption had run out, but the town was willing to give something. He said he wanted to buy, but he could not give any more than the town give. I told him that I thought he ought to give more. He said he could not give any more, it was the town's money. I asked him what the town wanted to get the deed for. I don't remember his reply. I told him that I had disposed of the land to Edwin A. Lacey, who was then dead, and that I did not know that I could give anybody else a deed. Mr. Lombard said that he did not care whether I could or not, if I would only give him a deed, he would give me the money. We then went down to

37 Squire Beer's office in Newtown, and Mr. Lombard drew up a deed, and I signed it, and he gave me seventeen dollars, and said that was all the town would pay, and if he paid anything more, he would have to pay it out of his own pocket. He paid me two dollars and a half more. After I had executed the deed, Mr. Lombard said he wanted me to make an affidavit that I was the identical Ziba Parmely who served as private in Captain Tilden's company, thirty-seventh infantry, in the war of eighteen hundred and twelve. I told him I was willing to do so. He then drew up a paper, and I swore to it before Squire Beers. I did not read the paper that I swore to; Lombard read it. I further testify that I was a private in Captain Tilden's company, thirty-seventh infantry, in the war of 1812; that I enlisted at the age of twenty-one years, and that I received from the government what is commonly called a land war-

rant for a half section of land in Illinois, and it was this land which the government gave me for my services in the war which I conveyed to Doctor Edwin A. Lacey, as I have hereinbefore stated.

I further testify that I should not have given the deed to
38 Lombard, if I had supposed that it was for any purpose to be used to the prejudice of the heirs of Lacey. I further testify that a few months after said Mr. Lombard obtained the deed spoken of, it was represented to me that there was no deed upon record from me to Edwin A. Lacey for the land. That the deed, if any had been given, was lost. I was requested to execute a deed to Andrew H. Lacey, the son and only heir of Doctor Edwin A. Lacey, which I did, and executed the deed accordingly, conveying the same land, as I now believe, to him, which deed was given to show that I had before that time sold the land to Doctor Lacey, and to enable the heirs to obtain their property. I further testify, that I did not state to said Lombard that I did not know the name of the Doctor to whom I had sold the land. I did not tell said Lombard that I talked of selling the land to a doctor. I distinctly told him that I had sold it to Doctor Lacey. I could not possibly have told him that I did not know the name of the doctor, for the reason Doctor Edwin A. Lacey had doctored in my family to some extent; that Doctor Edwin and his father were both physicians, practicing in company for some years, residing in Brookfield, about four to four and
39 a half miles from my house, and I had known the family for many years, and was well acquainted with them. I never told Mr. Lombard that I refused to give a deed to Doctor Lacey for the land. I never told Lombard that a relative of a doctor had applied to me, after the doctor's decease, to get a deed for the land, and that I would not give it.

Cross-interrogatories to be propounded to Zebe Parmelee, on the part of defendant.

1st. Are you the same Zeba Parmelee who served in the last war with Great Britain? If so, in what company and regiment did you serve? Who commanded the company? Who the regiment? Where were you discharged? and where have you resided ever since?

Answer. I am the same Zeba Parmely that served in the last war with Great Britain, and served in Captain Tilden's company, thirty-seventh infantry. I do not remember the name of the colonel of the regiment. I was discharged about five or six months after peace was declared. I resided about eight years, after I was discharged, in the township of Danbury. I have resided ever since I left Danbury, in this town where I now reside.

40 2d. Can you read writing? If not, how can yon tell tell whether the mark × thus is your mark or not? If you can, tell whose hand writing the deed is.

Answer. I could read writing until within the last twenty or twenty-five years. I could write, and always wrote my name until a fit of sickness, upwards of thirty years ago, since which time I

used a cross as my mark in affixing my signature to papers. I can only say that the cross upon the deed looks like the mark I usually make. I do not know whose handwriting the deed is in.

3. Where were you the year and month the deed bears date? Have you ever seen said deed before? If so, when and where? and what had you to do with it? How came the deed to be made? For what purpose was it made? by whom, when, and where, and under what circumstances?

Answer. I resided on this farm, where I now reside, at the date of the deed, 1837. I have resided on this same farm upwards of forty years. I don't remember of seeing the deed since I gave it, until this day, when I examined it before giving my deposition. The deed was made to convey the land to Doctor Lacy for the purpose of
41 given him the title, he having purchased the land of me. I think the deed was drawn by Squire Smith, of Brookfield. I do not remember distinctly, and do not remember the particular circumstances, whether it was at his office or at my house.

4. Did you ever acknowledge a deed conveying land in Illinois? If so, state when such deed or deeds were acknowledged? How many; before what officers; when and where?

Answer. I did acknowledge a deed conveying lands in Illinois, the same lands in question, but no other lands. I never owned any other land in that State. The first deed I acknowledged was this deed, marked "Exhibit A;" the next was the deed spoken of given to Lombard; the next deed, the one spoken of, given to Andrew Lacy. I think the deed given to Lombard was acknowledged before Squire Beers at his office, in Newtown, four miles from my house. Those deeds were all I ever gave for lands in Illinois.

5. State whether you have any means of determining the handwriting of the deed; and if so, what means? State specifically.

Answer. I have no means of determining the handwriting of the deed.

6th. State whether you are acquainted with Bryant Smith;
42 and if so, where does he reside? How long has he resided there? and whether he was or not an acting justice of the peace at the time the deed purports to have been acknowledged?

Answer. I am acquainted with Bryant Smith; he resides in Brookfield, four miles from me. I think he was born in Brookfield from what I have heard. He has resided there upwards of forty years, and I have been acquainted with him all the time. He has been a justice of the peace a great many years. I think he was a justice of the peace as long ago as forty years; and he was justice of the peace in 1837, I think, certainly, and for several years thereafter.

his
ZIBA × PARMELY.
mark.

Subscribed and sworn to before me this 12th day of August, 1864.
THEODORE McDONALD,
Commissioner.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Interrogatories to be administered to Bryant Smith, of Brookfield, in the county of Fairfield and State of Connecticut, a witness to be produced, sworn, and examined, under and by virtue of
43 the annexed commission before Nelson Taylor, esquire, in a certain cause now pending and undetermined in said Circuit Court, wherein Josiah M. Mills and Flora M. Mills are plaintiffs, and Nathaniel Smith is defendant, on the part and behalf of said plaintiffs, as follows, to wit:

DANBURY, *August 13th*, 1864.

STATE OF CONNECTICUT, *Fairfield County, ss:*

Bryant Smith, of Brookfield, in said county, of lawful age, being duly cautioned and sworn, doth depose and say, in answer to the direct and cross-interrogatories above written, as follows:

Interrogatory first. What is your name, age, occupation, and place of residence?

Answer. My name is Bryant Smith; my age is seventy-three years; my occupation is a lawyer; my residence is in Brookfield, Fairfield county, State of Connecticut.

Interrogatory second. Do you know the parties, plaintiff and defendant in the caption to these interrogatories mentioned, or either, and which of them, and how long have you known them respectively?

Answer. I know Flora M. Mills. I have known her thirty
44 years. I knew her when her name was Flora M. Lacy, and have known her ever since.

Interrogatory third. Look at the deed attached to the deposition of Zeba Parmelee taken in this cause, and marked "Exhibit A," and state what you know about the execution, acknowledgment, and delivery of said deed.

Answer. I drew the deed, and it is in my handwriting. I saw it executed, and signed my name as a witness thereto. I wrote the name of Zeba Parmely, at his request, and saw him fix his mark thereto. He acknowledged the deed before me; and I was then a justice of the peace for the county of Fairfax, residing in Brookfield. My name is signed to that certificate of acknowledgement as justice of the peace. The deed was signed, sealed, and delivered to Edwin A. Lacey in my presence. George B. Hurd, the other subscribing witness to the deed, has been dead several years, according to reports. He left this part of the country and went to Texas about twenty years ago.

Cross-interrogatories to be propounded to Bryant Smith.

1st. State, if you know, by whom the body of the deed attached was written? (i. e.) whose handwriting is it? whose handwriting is the words "Bryant Smith," attached to the acknowl-
44 ment?

Answer. The deed was written by me. It is in my handwriting, and the words Bryant Smith signed to the acknowledgement are in my handwriting.

2. State whether you was a justice of the peace at that time or not? Also, if you filled up the deed, how you knew that Zeba Parmalee owned the land therein described?

Answer. I was a justice of the peace at the date of the acknowledgement, February 11th, 1837, and had been for some years prior, and have been for several years since. I did fill up the deed, as before stated, and Mr. Parmely gave me the patent from the government, and I copied the description into the deed; and the patent, I think, was given to Mr. Lacey, with the deed, by Mr. Parmely.

3d. How came said deed to be made and acknowledged? Give the history thereof, if you know.

Answer. I was requested to draw the deed by one or both of them, and I drew it accordingly. Any further than that, regarding the history thereof, I am unable to state.

BRYANT SMITH.

Subscribed and sworn to before me this 12th day of August, 1864.

THEODORE McDONALD,
Commissioner.

46 The plaintiffs further offered and gave in evidence to the July , under objection of the defendant, the will of Andrew H. Lacy, which said will is as follows:

The last will and testament of Andrew H. Lacy, of the city of Kenosha and State of Wisconsin.

I, Andrew H. Lacy, considering the uncertainty of [of] this mortal life, and being of sound mind and memory, do make this my last will and testament, in manner and form as follows, (and publish the same as my last will and testament,) to wit:

First. I commend and give my soul to Almighty God.

Second. I give and bequeath unto Flora M. Lacy, my mother, all and singular my personal property in my possession at the time of my decease, and all and singular all the personal estate which I now or may hereafter become the owner of, either by purchase or inheritance, or in any other way or manner, hereby meaning to give and bequeath unto my said mother. Flora M. Lacy, all my personal property, now or hereafter to be obtained by me, and owned and possessed by me at the date of my decease.

47 Third. I hereby give, bequeath, and demise unto Flora M. Lacy, my said mother, all and singular the real estate of any nature, kind, or description whatever, and all and singular my right in and to any real estate at the time of my decease, and the interest in and to any and all real estate owned by me at the time of my decease; hereby meaning to make my said mother the heir of all and singular the real estate owned and possessed by me at the time of my

decease, wherever the same may be located, and to give to my said mother all my right, title, and interest in and to the same, either in present possession, or in expectancy, and to give and bequeath unto her all and singular any and all property, of any nature or kind, in law or equity, which I may die possessed of, or to which I may have legal or equitable rights.

In witness whereof, I have hereunto set my hand and seal this twenty-second (22) day of September, in the year of our Lord one thousand eight hundred and fifty-five.

[SEAL.] ANDREW H. LACY.

The above instrument, consisting of one sheet, was now here subscribed by Andrew H. Lacy, the testator, in the presence of
48 each of us; and was at the same time declared by him to be his last will and testament; and we, at his request, sign our names hereunto, in his presence, as attesting witnesses.

E. W. EVANS.
H. H. WALKER.
J. G. McCRACKEN.

STATE OF WISCONSIN,
Kenosha County probate registry, ss:

I, Isaac W. Webster, judge of the County Court of said county, do hereby certify that I have compared the above and foregoing copy of the last will and testament of Andrew H. Lacy, late of the city and county of Kenosha, and State of Wisconsin, deceased, with the original preserved and on file and of record in said probate office, and that the same is a true copy thereof, and the whole of said original will on file as aforesaid; that the same was duly executed according to the laws of this State, and [and] duly proved and admitted to probate, according to the laws of the State where the same was executed.

In witness whereof, I have hereunto subscribed my name and affixed the seal of the County Court of said county of Kenosha,
49 in said county, this 25th day of July, A. D. 1862.

[SEAL.] ISAAC W. WEBSTER,
County Judge.

STATE OF WISCONSIN,
Kenosha County probate registry, ss:

I, Jon. B. Jilsun, judge of the County Court of said county, do hereby certify that I have compared the above and foregoing copy of the last will and testament of Andrew H. Lacy, late of the city and county of Kenosha and State of Wisconsin, deceased, with the original will preserved and on file in said probate registry, and that the same is a true copy thereof, and the whole of said original will on file as aforesaid, and proved and recorded in this office.

In witness whereof, I have hereunto subscribed my name and affixed the seal of the County Court of said county, at Kenosha, in said county, this 26th day of April, A. D. 1858.

JON. B. JILSUN,
County Judge.

The plaintiffs further offered and gave in evidence to the jury the deposition of Flora M. Mills, which is as follows:

50 *Deposition of Flora M. Mills.*

Be it remembered, that on application of E. S. Smith, esq., attorney for the plaintiffs, in a suit now pending in the Circuit Court of the United States for the eighth circuit and northern district of Illinois, wherein Josiah M. Mills and Flora M. Mills are plaintiffs, and Nathaniel Smith is defendant, I, James Miller, a notary public in Grand Rapids, Kent county, in the State of Michigan, have, this twenty-eighth day of April, A. D. 1865, at Grand Rapids, in the county and State aforesaid, without having given notice to the said defendant or his attorney, proceeded to examine Flora M. Mills, de bene esse, as a witness on behalf of the said plaintiff, in the aforesaid suit; and I certify that the reason for taking said deposition is, and the fact is, that the said witness resides in Cannonsburg, in the county of Kent, and State of Michigan, more than one hundred miles from the city of Chicago, the place where the court in which said cause is expected to be tried is appointed by law to be held; and the reason why notice of the time and place of taking said deposition was not given to the said defendant or his attorney is, and the fact is, the said defendant and his attorney reside in the State of Illinois, and more than one hundred miles from Grand Rapids, the place where said deposition was taken. And I do further certify
51 that the said Flora M. Mills being by me carefully examined, cautioned, and duly sworn to testify to the whole truth, says: My name is Flora M. Mills, and am one of the plaintiffs in the above-mentioned suit, and reside at Cannonsburg, and county of Kent, and State of Michigan. I am upwards of the age of fifty-six years old, and was married to Joshua Mills on the nineteenth day of January, in the year of our Lord eighteen hundred and fifty-eight, who is my second husband. I was married to Edwin A. Lacey on the seventeenth day of November, A. D. 1828, and had two children by him, one named Andrew H. Lacey, and the other Julia M. Lacey. My son, Andrew H. Lacey, was born on the seventeenth day of October, A. D. 1829; my daughter, Julia M. Lacey, was born on the nineteenth day of September, in the year 1831; she died on the twentieth day of July, A. D. 1847. My first husband, Edwin A. Lacey, died in Brookfield, Connecticut, on the twentieth day of May, A. D. 1848. Andrew H. Lacey, my son, survived my said first husband, and was his only heir. My son, Andrew H. Lacey, died at the city of Kenosha, in the State of Wisconsin, on the fourth day of December, A. D. 1855, and before his death he made a will bequeathing to me all his property. Some time prior to the death of my first husband, he purchased a tract of land, situated, as I understood, in the State of Illinois, of Zebe Parmely, who resided near the place of my said husband's
52 residence. I remember of hearing my said husband say that he had requested some one to look after his land in Illinois, but who, or what was to be done, I do not remember.

The land in question in the suit is the land my husband purchased of said Parmely, so far as I have any knowledge or information; and I state further, that he was not interested in any other land, situated in the State of Illinois, during his lifetime, so far as my knowledge extends; and if he had been I should have known of it.

FLORA M. MILLS.

And I do further certify that the preceeding deposition was reduced to writing by me, and signed by the said Flora M. Mills in my presence, and that I am not attorney or of counsel for either of the parties to said suit, nor am I interested in the event thereof.

Witness my hand and official seal this 28th day of April, A. D. 1865.

[SEAL.] JAMES MILLER,
Notary Public, Kent Co., Michigan.

The plaintiffs further offered and gave in evidence to the jury the deed of Parmalee to Andrew H. Lacey, recorded Nov. 25, 1854, as confirmatory, and in connection therewith the deposition of William F. Lacey, which said deed and deposition are as follows:

53 *Deposition of W. F. Lacey.*

DANBURY, *July* 16*th*, 1861.

STATE OF CONNECTICUT, *County of Fairfield, ss:*

Be it remembered, that on application of E. S. Smith, attorney for the plaintiffs in a suit in ejectment, now pending in the Circuit Court of the United States for the seventh circuit and northern district of Illinois, wherein Josiah M. Mills and Flora M. Mills are plaintiffs, and Nathaniel Smith is defendant, I, Wlliam P. Seeley, a notary public in and for the county of Fairfield and State of Connecticut, have, this 16th day of July, A. D. eighteen hundred and sixty-one, at my office, in Danbury, in said county, having given no notice to the defendant, proceeded to examine William F. Lacey, of said Danbury, as a witness on behalf of the plaintiffs, in the aforesaid suit; and I certify that the reasons for taking said deposition, and the fact is, the said witness resides at Danbury, in the State of Connecticut, more than one hundred miles from Chicago, Illinois, the place where the court in which said cause is expected to be tried is appointed by law to be held; and the reason why notice of the time and place of taking said deposition was not given to the said defendant or his counsel is, and the fact is, the said defendant and his counsel
54 resides in the State of Illinois, more than one hundred miles from Danbury, Connecticut, the place where the said deposition was taken; and I do further certify that the said William F. Lacey, being by me carefully examined, cautioned, and duly sworn to testify the truth, the whole truth, and nothing but the truth, in said suit pending in the Circuit Court of the United States for the northern district of Illinois, between the parties aforesaid, testified as follows:

My name is William F. Lacy; am of the age of thirty-eight years, and reside in Danbury, in the State of Connecticut; am a physician by profession. I am acquainted with the plaintiffs, and not with the defendants. Flora M. Mills is now the wife of Josiah M. Mills. She was the wife of Edwin A. Lacey, now deceased, who died in May, eighteen hundred and forty-eight, at Brookfield, Fairfield county, Connecticut. Flora had two children by her first husband, Andrew H. Lacey and Julia M. Lacey. Julia M. died July twentieth, eighteen hundred and forty-seven. Andrew H. Lacey was son and only heir of Edwin A. Lacey at his decease. Andrew H. Lacey died in the year eighteen hundred and , and
55 before his death made a will, giving property to his mother, Flora M. Mills. Edwin A. Lacey was my brother. I have known Ziba Parmely for many years. He sold my brother a tract of land in Illinois. I know the said Ziba Parmely conveyed the lands sold to my brother to Andrew H. Lacey. I witnessed the deed conveying the same, and know that the conveyance was so made to Andrew H., for the purpose expressed and recited in the deed. The deed given by said Parmely to Andrew H. Lacey, which I saw signed, sealed, and delivered, referred to in this deposition, I attach to my deposition marked "A."

WILLIAM F. LACEY.

Sworn to and subscribed before me. In witness whereof, I have hereunto set my hand and affixed the seal of my office, at said Danbury, the sixteenth day of July, A. D. eighteen hundred and sixty-one.

[SEAL.] WM. P. SEELEY,
Notary Public.

Exhibit "A."

Know all men by these presents, that whereas I, Ziba Parmelee, of Newtown, in the county of Fairfield, and State of Connecticut, did, on or about the 1st day of October, A. D. eighteen hun-
56 dred and thirty-five, bargain and sell unto Edwin A. Lacey then of Brookfield, in said county and State, since deceased, the south half of section thirty-six, (36,)in township No. twelve,(12,) north of range No. seven, (7,) east of the 4th principal meridian, military bounty lands, in the State of Illinois, it being the same tract of land which the said Ziba obtained on account of services in the war with Great Britain, declared by the United States on the 18th day of June, 1812, which said tract was so bargained and sold by me to the said Edwin A. at and for the sum of thirty dollars:

Now, therefore, for and in consideration of the said sum of thirty dollars, to me in hand paid, to my full satisfaction; and in further consideration that no deed of conveyance was ever executed by me to the said Edwin A. Lacey for the tract of land above described, I, Ziba Parmelee, do by these presents bargain, sell, transfer, and quit claim unto Andrew H. Lacey, of Bristol, in the county of Kenosha and State of Wisconsin, son and only heir-at-law of said Edwin A.

Lacey, deceased, the south half of section thirty-six, (36,) in township No. twelve, (12,) north of range No. seven, (7,) east of the 4th principal meridian, military bounty lands in the State of Illi-
57 nois, being the same tract hereinbefore described, to have and to hold the premises, with all the appurtenances, unto the said Andrew H., his heirs and assigns forever, so that neither I, the said Ziba Parmelee, nor my heirs, nor any other person under me or them, shall hereafter have any claim, right, or title in or to the premises, or any part thereof, but therefrom I and they are, by these presents, forever barred and secluded.

In witness whereof, I have hereunto set my hand and seal this 14th day of November, A. D. 1854.

his
ZIBA PARMELEE.
mark.

Signed, sealed, and delivered in presence of—
WILLIAM F. LACEY.
DAVID B. BOOTH.

NEWTOWN.

STATE OF CONNECTICUT, *County of Fairfield, ss*:

Be it remembered, that on this fourteenth day of November, one thousand eight hundred and fifty-four, before the subscriber, a notary public in and for said State, duly appointed, commissioned, and sworn, and authorized by law to take the acknowledgment of deeds and to administer oaths and affirmations, personally
58 appeared Ziba Parmelee, to me known to be the real person whose name is subscribed to the foregoing conveyance, and he acknowledged to me that he executed the same.

In testimony whereof, I have hereunto set my hand and affixed my seal of office, at Newtown, in said county and State, this fourteenth day of November, one thousand eight hundred and fifty-four.

[SEAL.] DAVID B. BOOTH,
Notary Public.

Endorsed: Filed, Nov. 25th, 1854, and recorded this date, in book I, on page 430 and 31. Jefferson Winn, recorder. Exd. No. 4,637.

Plaintiffs here rested their case.

59 *Defence.*

The defendant, Nathaniel Smith, to maintain the issue on his part, offered and gave in evidence to the jury a deed from Ziba Parmalee to James Lombard, recorded August 28th, 1854; also, an affidavit of said Parmalee.

"A."

This indenture, made this fourteenth day of August, in the year of our Lord one thousand eight hundred and fifty-four, witnesseth: That Ziba Parmely (late a private in Captain Tilden's company, 37th regiment of infantry, war of 1812,) of the county of Fairfield and State of Connecticut, party of the first part, in consideration of the sum of one dollar cash in hand paid by James Lombard, of the county of Suffolk and State of Massachusetts, party of the second part, the receipt of which is hereby acknowledged, do hereby release, grant, bargain, and quit claim unto the said party of the second part, his heirs and assigns forever, all that certain tract of land situated in the tract appropriated for military bounties in the State of Illinois for the war of 1812, being the south half (S. $\frac{1}{2}$) of section No. (36,) in township No. (12), twelve north, and range No. (7) seven, east of the fourth principal meridian, containing 320 acres, be the same more
60 or less, and being the tract granted by the United States of America to the aforesaid Ziba Parmley, late a private in Captain Tilden's co., 37th inf'y, war of 1812, by letters patent, bearing date of July 29th, 1818, and founded upon warrant No. 530, reference being made to said patent will more fully appear, wherein it is described as aforesaid, viz: the south half of section No. (36,) thirty-six, township No. (12) twelve, north range, No. (7) seven east, which is hereby conveyed to said party of second part, to have and to hold the said premises, with all the appurtenances thereunto belonging or in anywise appertaining, to the only proper use, benefit, and behoof of said party of the second part, his heirs and assigns forever.

In witness whereof, the said grantor has hereunto set his hand and seal the day and year first above written.

[SEAL.] ZIBA + PARMELY. his mark.

Signed, sealed, and delivered in presence of—
BENJAMIN LOMBARD, Jr.
HOBART B. CAMP.

STATE OF CONNECTICUT, *Fairfield County, ss*:

I, David B. Beers, a justice of the peace and notary public
61 in and for said county, do hereby certify that Ziba Parmley, personally known to me as the same person whose name is subscribed to the within deed, appeared before me this day in person, and acknowledged that he signed sealed, and delivered the said instrument of writing as his free and voluntary act and deed, for the uses and purposes therein set forth.

Given under my hand and notarial seal this 14th day of August, A. D. 1854.

[SEAL.] DAVID B. BEERS,
Justice of the Peace and Notary Public.

"B."—Proof of identity.

STATE OF CONNECTICUT, *County of Fairfield, ss:*

On this fourteenth day of August, A. D. 1854, personally appeared before me, David B. Beers, a justice of the peace and notary public in and for said county, duly authorized to administer oaths, &c., Ziba Parmeley, to me personally known as a credible person, who, being duly sworn according to law, doth depose and say that he, the said deponent, is the identical Ziba Parmly who served as a private in Captain Tilden's company, 37th inf'y, war of 1812; that
62 he was born in Newtown, Connecticut; was 21 years at the time of his enlistment, 5 feet 5 inches high, and a farmer by occupation; and that the deed he has this day given for his bounty land claim is the only deed ever given by him for said claim whatsoever; and that the above statement is strictly true, to the best of his knowledge and belief.

In witness whereof, I have hereunto set my hand and seal the day and year first above written.

[SEAL.] his ZIBA × PARMLEY. mark.

Witness:
D. B. BEERS.

Sworn and subscribed to before me, David B. Beers, a justice of the peace and notary public.

In witness whereof, I have hereunto set my hand and affixed my notarial seal this fourteenth day of August, A. D. 1854.

[SEAL.] DAVID B. BEERS,
Justice of the Peace and Notary Public.

Filed August 28th, 1854, and recorded this date in book I, on page 111.

J. WINN,
Recorder of Stark County, Ill's.

The defendant also gave in evidence a deed from James Lombard to himself, recorded Oct. 12, 1858, which is as follows:

This indenture, made this seventh day of December, in the
63 year of our Lord one thousand eight hundred and fifty-five, witnesseth: That James Lombard, and Mary A., his wife, of the county of Suffolk and State of Massachusetts, parties of the first part, in consideration of the sum of nineteen hundred dollars in hand paid by Nathaniel Smith, of the county of Peoria and State of Illinois, part of the second part, the receipt of which is hereby acknowledged, do hereby alien, release, remise, and quit claim unto the said party of the second part, heirs and assigns forever, that certain tract of land known and described as being the south half of section (36) thirty-six, in township (12) twelve north, and range (7) seven, east of the 4th P. M., lying and being in the county of Stark and State of Illinois, to have and to hold the said premises, with all the appur-

tenances thereunto belonging or in anywise appertaining, to the only proper use, benefit, and behoof of said party of the second part, heirs and assigns, forever.

In witness whereof, the said grantors have hereunto set their hand and seal the day and year first above written.

[SEAL.] JAMES LOMBARD.
[SEAL.] MARY A. LOMBARD.

Signed, sealed, and delivered in presence of—

64 STATE OF MASSACHUSETTS, *County of Suffolk, ss*:

I, Daniel Sharp, jr., a notary public in and for said county, do hereby certify that James Lombard and Mary A. Lombard, personally known to me as the same person, whose names are subscribed to the within deed, appeared before me this day in person, and acknowledged that they signed, sealed, and delivered the said instrument of writing as their free and voluntary act and deed for the uses and purposes therein set forth; and the said Mary A., wife of the said James Lombard, having been by me examined separate, and apart, and out of the hearing of her husband, and the contents and meaning of said instrument of writing, having been by me fully made known and explained to her, acknowledged that she had freely and voluntarily executed the same, and relinquished her dower and title to the lands and tenements therein mentioned without compulsion of her said husband, and that she does not wish to retract the same.

Given under my hand and official seal this 10th day of March, A. D. 1856.

[SEAL.] DANIEL SHARP, Jr.,
Notary Public.

RECORDER'S OFFICE, *Toulon.*

65 STATE OF ILLINOIS, *County of Stark, sct*:

I, Jefferson Winn, clerk of the Circuit Court and ex-officio recorder in and for said county, do certify that the attached deed or instrument of writing and certificates thereto were this day duly recorded in my office in book P, page 618.

Given under my hand and official seal, at Toulon, this 12th day of October, A. D. 1858.

J. WINN, *Recorder of Stark Co., Ill.*
By THEO. A. FOREMAN, *Dep'ty.*

No. 9,024.]

The defendant further offered and gave in evidence to the jury the deposition of Benjamin Lombard, jr., which deposition is as follows:

Deposition of Benjamin Lombard.

Be it remembered, that on application of Norman H. Purple, esq., attorney for the defendant in a suit in ejectment now pending in the Circuit Court of the United States for the seventh circuit and north-

ern district of Illinois, wherein Josiah M. Mills and Flora M. Mills are plaintiffs, and Nathaniel Smith is defendant, I, Wm. Hobbs, jr., a notary public in and for the county of Suffolk, in the State of Massachusetts, have this sixteenth day of April, A. D.
66 1861, at my office, in the city of Boston and State aforesaid, having given no notice to the said plaintiffs, proceeded to examine Benjamin Lombard, jun., of Somerville, in the State aforesaid, as a witness on behalf of the defendant in the aforesaid suit; and I certify that the reason for taking said deposition is, and the fact is, the said witness resides at Somerville, in the State aforesaid, more than one hundred miles from Chicago, Illinois, the place where the court in which said cause is expected to be tried is appointed by law to be held; and the reason why notice of the time and place of taking said deposition was not given to the said plaintiffs or his counsel is, and the fact is, the said plaintiffs reside in the State of Michigan, and their counsel reside in the State of Illinois, more than one hundred miles from Boston, Massachusetts, the place where said deposition was taken; and I do further certify that the said Benjamin Lombard, jun., being by me carefully examined, cautioned and duly sworn to testify the whole truth, says:

That his name is Benjamin Lombard, jr.; that he is 24 years of age, and resides in Somerville, Middlesex county, State of Massachusetts, and by occupation a real estate dealer; that he is not
67 particularly acquainted with either party to this suit, never knew or saw either of the plaintiffs to his knowledge; has seen the defendant, but cannot say when or where; was acquainted with Ziba Parmely, who, on the fourteenth day of August, A. D. 1854, lived in the town of Newtown, county of Fairfield and State of Connecticut, about one mile from Hawleyville depot; that he first became acquainted with him on said fourteenth day of August, A. D. 1854, in said town of Newtown, where he went to find one Ziba Parmely, who served as a soldier in Capt. Tilden's company of the 37th regiment of infantry war of 1812 & 14, who, it stated in information, received by him from Washington, was born in the town of Newtown aforesaid; and having upon inquiry ascertained that said Ziba Parmely first mentioned, was the same man who served as aforesaid, and who he wished to find, he went to his residence, and was there informed that he was haying in a field near by, where he went and found him; and after some conversation as to his services in said war of 1812 & '14, he purchased of him, the said Ziba Parmely, for James Lombard, of Suffolk county, State of Massachusetts, the south half of section No. (36) thirty-six, in township No. (12) twelve north, and range No. (7) seven east, in the county of Stark and State of
68 Illinois, it being land which was granted to him for his services as a soldier aforesaid, and at the same time took from him a deed for said premises to said James Lombard, and paid him for same a valuable consideration in current bank bills, the exact amount of which he has forgotten; that he witnessed said deed in presence of said Ziba Parmely, and at his request he then walked with said Ziba Parmely to his place of residence; and after waiting

there a few minutes they proceeded together to the office of David B. Beers, a notary public and justice of the peace in and for said county of Fairfield, before whom the said Ziba Parmely acknowledged the execution of said deed, and also made affidavit that he served in Tilden's company of the 37th regiment of infantry war of 1812 & '14, as aforesaid; and that the deed he gave him, said deponent, was the only deed ever given by him for said land, a true copy of which deed and affidavit above-mentioned is, together with the certificates thereunto attached, annexed to this deposition, and marked "A."

That at the time of making the purchase of said Zeba Parmely aforesaid, he said his land was sold for taxes; and before going to the office of the notary public aforesaid, showed him a letter from parties in New York dated, he thinks, about the year 1832, saying his land was sold for
69 taxes and was past redemption, and said Parmely made the remark to him that he supposed it would be quite valuabe to him had he not lost it through tax sales; he also said he had never given a deed, power-of-attorney, or other instrument of writing, for the sale or conveyance of said land above described; that he talked of selling said land to a doctor near him; that he does not now remember the name of said doctor; and also said to him, the said deponent, that said doctor was to have given him a cow or horse for the same; that he does not recollect which; that the cow or horse proved worthless, and not as represented, and he the said Parmely, refused to give any deed to the said doctor for said land; that a son or relative of the said doctor had since been to him to get a deed for said premises, but he would not give it, for the reason he never received pay, and the trade had fallen through on account of the said doctor not doing as he agreed; that he did not think to ask said Ziba Parmely the date of his proposed trade with said doctor, as said Parmely in the field where he first found him, and also on the way to the office of the said
70 D. B. Beers, repeatedly said that he had never given a deed, power-of-attorney, or any other kind of conveyance of said land to any person or persons whatever previous to the deed that day executed to James Lombard, as hereinbefore set forth, of which fact he said he was willing to swear, to which he did make affidavit before D. B. Beers, as hereinbefore stated; that said Parmely also stated to him that he hoped he, said deponent, would do well on this claim; that at time of taking said deed from said Parmely he had no notice whatever from any one; that said Parmely had ever sold, aliened, transferred or assigned, or encumbered said premises to any person or persons whatever, or had given any one else any power or authority to sell, alien, transfer, assign, or encumber the same; but that he did have positive notice from the said Parmely, that he had never sold, aliened, transferred, assigned, or incumbered said premises, or given any one authority to do said acts, or any of them, and supposed at the time of the purchase, and for two years afterwards, that the premises purchased from him as hereinbefore set forth, were at the time of said purchase by him for said James Lombard free
71 from any and all sales or incumbrances made or done, or author-

ized to be made or done by the said Ziba Parmely; that he does not know of anything else that will benefit, or be of benefit, to either party to this suit.

BENJAMIN LOMBARD, Jr.

And I do further certify that the preceeding deposition was reduced to writing by me, and signed by the said Benjamin Lombard, jr., at my office, in the city of Boston, county of Suffolk and State of Massachusetts, in my presence, and that I am not of counsel or attorney for either of the parties to said suit, nor am I interested in the event thereof.

Witness my hand and notarial seal this sixteenth day of April, A. D. 1861.

[SEAL.] WM. HOBBS, Jr.

Notary Public for Suffolk County State of Massachusetts.

Exhibit "A" is a copy of deed already copied on page 59 et seq., of this transcript.

The defendant also gave in evidence the first deposition of Zeba Parmalee, which is as follows:

UNITED STATES OF AMERICA,

Northern District of Illinois, ss:

Interrogatories to be administered to Ziba Parmely, of New-
72 ton, in the country of Fairfield and State of Connecticut, witness to be produced, sworn, and examined under and by virtue of the annexed commission, before Nelson Taylor, esquire, in a certain cause now pending and undetermined in said Circuit Court, wherein Josiah M. Mills and Flora M. Mills are plaintiff, and Nathaniel Smith defendant, on the part and behalf of said plaintiffs as follows, to wit:

Interrogatory first. What is your name, age, occupation, and place of residence?

Answer. My name is Ziba Parmely; my age 69 years; my occupation a farmer; and my place of residence, Newtown, Connecticut.

Interrogatory second. Do you know the parties, plaintiff and defendant, in the caption to these interrogatories mentioned, or either and which of them, and how long have you known them respectively?

Answer. I do not know either of the parties mentioned.

3d interrogatory. State whether you ever owned the south half of section thirty-six, township twelve, north of range seven east, in the military tract, in the State of Illinois, and from whom,
73 or from what source, you obtained title thereto, and when; whether the evidence of title received by you was a deed or a warrant.

Answer. I once owned the tract of land mentioned and described. I obtained my title from the United States government. The evidence of title was a warrant.

4th interrogatory. State whether you ever sold the said tract of land, and to whom and when you made sale thereof, and whethre you received full pay therefor.

Answer. I sold said tract of land to Doctor Edwin A. Lacy—this was about 20 or 25 years ago; I do not remember the date. He gave me a note for the purchase money for the sum of thirty dollars.

5th interrogatory. State what evidence of title, if any, you gave to the party to whom you sold the said tract of land.

Answer. I gave to Edwin A. Lacy the warrant I got from the United States government.

6th interrogatory. State whether you gave a deed for said land, a copy of which is annexed to this commission issued in this suit, marked Exhibit "A."

Answer. I gave the deed mentioned and described and
74 marked Exhibit "A."

7th interrogatory. State whether you gave said deed for the purpose of conveying the said tract of land pursuant to the sale made to Edwin A. Lacy in his lifetime.

Answer. I gave the deed for the purpose of conveying the said tract of land in pursuance of the sale made to Edwin A. Lacy in his lifetime.

8th interrogatory. State whether any person called upon you since eighteen hundred and fifty, and solicited you to make a deed for said tract of land.

Answer. There was was a man called on me for a deed of said tract of land since the year 1850.

9th interrogatory. If you answer the eighth and last interrogatory in the affirmative, then state the name of the person or persons, when and where you were so called upon; and state fully each and every circumstance, statement of the party, and also what you said in reply, and also what you said about the said tract of land, and to whom you had sold the same, and every matter or thing which took place between you and the person or persons, as fully and
75 particularly as though you were specially interrogated thereto?

Answer. The name of the man who called on me was Lombard, but his first name I do not know; the time was six or seven years ago; I do not remember the exact date. This was at my house in Newtown, where I now reside. He said to me that the town where the land lay wanted to get a deed from all the men owning land there, and had agreed to give seventeen dollars a head, that the right of redemption had run out. I told him I had disposed of it to Edwin A. Lacey, but had never given any deed. He then said that if I had never given any deed that I could sell it again. We then went down to Newtown street to the office of D. B. Beers. Mr. Lombard drew up a deed then and I signed it. He paid me seventeen dollars, and said that was all the town would pay, and if he paid anything more, he would have to pay it out of his own pocket. He paid me two dollars and a half more for my time lost from my work in going down to Mr. Beers' office.

10th interrogatory. Do you know of any other matter or thing

which may tend to benefit the plaintiffs in this suit? If yea, state fully every particular.

76 Answer. I know of nothing more that would tend to benefit the parties.

Cross-interrogatories to Ziba Parmely by defendant, Nathaniel Smith.

1st. If you say you once owned any land in Illinois, state how you remember the section, township, and range in which the same was situated, and whether you have any recollection on that subject.

Answer. I remember of the description of the land only from hearing it read from the deed to Andrew H. Lacey annexed, marked Exhibit "A."

2d. If you say you ever sold the land to any person except James Lombard, why did you not make a deed for it at the time to the purchaser?

Answer. I supposed that when I gave the warrant to Edwin A. Lacey that he did not want a deed, as he never mentioned anything about a deed, or asked me for a deed at that time.

3d. If you say you ever sold the land to Edwin A. Lacy, state how he paid you for it, whether in money or property; if in property, what was it, and how much was it worth; if in money, how much, and when was it paid, and when was the sale made, and who

77 was present at the time?

Answer. He paid me for it by giving me his note for thirty dollars. He gave me no property or money at the time of the sale. The sale was made 20 or 25 years ago—the exact date I do not remember—at the house of Edwin A. Lacey, in Brookfield, Fairfield county, Connecticut. I do not remember who was present, I think his family; some of them were present, but do not remember which of them.

4th. Have you ever told any person that you never had sold or conveyed the land previous to the 13th day of August, A. D. 1854? Have you not said that you once agreed to sell it to Edwin A. Lacy for a cow and some money, but that there was a disagreement about ten dollars, or some sum of money, and thereupon the trade fell through, or words to that effect?

Answer. I never have told any person at any time that I had never sold or conveyed the land at any time. I have never told any person that I agreed to sell it to Edwin A. Lacey for a cow and some money, and that there was a disagreement about any sum of money.

5th. Did you not, on or about the 14th day of August, A. D.

78 1854, in Fairfield county, in the State of Connecticut, tell Benjamin Lombard, jr., that you never had sold or conveyed said land to any person; that you had once talked of selling it to Edwin A. Lacy for a cow or for some other property and some money, but that there was a disageement about $10 00, or some other sum of money, and the trade fell through, or was not made, or words to that effect?

Answer. I did not, at the time mentioned, tell Benjamin Lombard, jr., that I had never sold the land to any person; but I did tell him

that I had never given a deed to any one for the land. I did not tell him or any one that I had agreed to sell it to Edwin A. Lacey for a cow, or any other property or money, or that there was a disagreement about any sum of money, and the trade fell through, or any words to that effect, for such was not the fact.

6th. How do you know that you made such a deed as the one now shown to you, or that the one shown is a copy of one you made?

79 7th. What is your exact age as near as you know?

Answer. My exact age is 69 years.

8. Is your eyesight and hearing, or either of them, good?

Answer. My eyesight and hearing are both good.

9. Can you see to read with or without spectacles?

Answer. I can see to read with spectacles.

10. Can you read or write?

Answer. I can read but not write. I could once write my name, but my hand trembles so now that I cannot.

11. Is not your memory very poor, and your recollection so imperfect that you cannot yourself place any reliance upon it?

Answer. My memory is very good, and my recollection as good and reliable as ever.

12. Did you not, on the 14th day of August, A. D. 1854, make an affidavit, which was then attached to a deed you made to James Lombard, in the words and figures, or to the effect, following?

Answer. I did make the affidavit mentioned.

his

80 ZIBA × PARMELEY.

mark.

Exhibit "A" referred to in this deposition is the same as Exhibit "A" referred to in deposition of Wm. F. Lacy, copied on page 55, et seq. of this transcript.

81 (Here defendant rested his case.)

The plaintiffs further offered and gave in evidence to the jury that certain part of the answer of Nathaniel Smith, the defendant, on a bill of discovery in chancery in this court, wherein Josiah M. Mills and Flora M. Mills are complainants, and James Lombard and Nathaniel Smith are defendant, which portion of said answer is as follows: "Having seen that the deed from the patentee to James Lombard was made and recorded prior to any other pretended conveyances, he was advised by counsel, and believed the same true, that he was procuring a perfect and equitable title to the land."

The plaintiffs further offered in evidence to the jury the deposition of David B. Beers, a part of which being objected to by defendant's counsel, the court excluded that portion of the deposition which is included in brackets.

82 *Deposition of David B. Beers.*

DANBURY, *July 15th*, 1861.

STATE OF CONNECTICUT, *County of Fairfield, ss*:

Be it remembered, that on application of E. S. Smith, attorney for the plaintiff in a suit in ejectment, now pending in the Circuit Court of the United States for the seventh circuit and northern district of Illinois, wherein Josiah M. Mills and Flora M. Mills are plaintiffs, and Nathaniel Smith is defendant, I, William P. Seeley, a notary public in and for the county of Fairfield and State of Connecticut, have, on this fifteenth day of July, A. D. one thousand eight hundred and sixty-one, at my office in Danbury, in said county, having given no notice to the defendant, proceeded to examine David B. Beers, of Newtown, in said county, as a witness on behalf of the plaintiffs in the aforesaid suit; and I certify that the reason for taking said deposition, and the fact is, the said witness resides in Newtown, in the State of Connecticut, more than one hundred miles from Chicago, Illinois, the place where the court in which said cause is expected to be tried is appointed to be held; and the reason why notice of the time and place of taking said deposition was not given to the said defendant or his counsel is, and the fact is, the said defendant and his counsel reside in the State of Illinois, more than one hundred miles from Danbury, Connecticut, the place where the said deposition was taken; and I do further certify that the said David
83 B. Beers, being by me carefully examined, cautioned, and duly sworn to testify the truth, the whole truth, and nothing but the truth in said suit pending in the Circuit Court of the United States for the northern district of Illinois, between the parties aforesaid, testified as follows:

My name is David B. Beers, and reside in Newtown, Fairfield county, Connecticut, and am of the age of fifty-six years. I know the plaintiff, Flora M. Mills, but not the other plaintiff or the defendant. I knew the former husband of Flora, Edwin A. Lacey, and knew him for a great many years. I have known Ziba Parmely for a great many years; he resides in the same town with me. On the fourteenth day of August, A. D. eighteen hundred and fifty-four, as appears from a copy of a deed annexed to this deposition, marked "A," the said Ziba Parmely, or some other person, called on me in Newtown, and requested me, I think, to go to the post-office, to take an acknowledgement of a deed. I went. But after I got there I hesitated, because I thought there was something wrong about it. I understood from some source that Parmely had conveyed and sold this land mentioned in the deed they wished me to take acknowledgement of to Edwin A. Lacey, then deceased, and had also delivered to Lacey the warrant obtained by him (Parmely) from the United States government and received his pay for it. My impression is that I received this information from Parmely himself. I understood that the sum Parmely received from Lombard was nominal. I heard no conversation between Lombard and Parmely about a
84 cow or a horse; but it is my impression that the sale to Edwin

A. Lacey from Parmely was talked up between us three, but the exact words I do not remember. I distinctly remember that, from the conversation had in my presence, that I was loth to take acknowledgement of the deed, and gave as an excuse that I had no notarial seal, but was told that a scroll would answer as well; and I finally, after being urged, asked Parmely and Lombard if it was all right, and they said they were satisfied, and I signed the deed as a witness, and took acknowledgement of the same. I have examined a certified copy of the deed so given by said Parmely and acknowledged before me, which I annexed to this deposition, marked "A," and believe it to be a copy of the same deed. I never took but the one acknowledgement of a deed from said Parmely to Lombard.

DAVID B. BEERS.

Sworn to and subscribed before me In witness whereof, I have hereunto set my hand and affixed my seal of office, at said Danbury, the fifteenth day of July, A. D. eighteen hundred and sixty-one.

[SEAL.] WM. P. SEELEY,
Notary Public.

85 No. 4,428.

AUG. 28TH, 1854.

John Parmely to James Lombard:

This indenture, made this seventeenth day of August, in the year of our Lord one thousand eight hundred and fifty four, witnesseth: That Zibra Parmely, late a private in Captain Tilden's company, 37th regiment of infantry, war of 1812, of the county of Fairfield and State of Connecticut, party of the first part, in consideration of the sum of one dollar cash, in hand, paid by James Lombard, of the county of Suffolk and State of Massachusetts, party of the second part, the receipt of which is hereby acknowledged, do hereby release, grant, bargain, and quit claim unto the said party of the second part, his heirs and assigns forever, all that certain tract of land situated in the tract appropriated for millitary bounties in the State of Illinois, for the war of 1812, being the south half (S. ½) of section No. (36,) in township No. (12) twelve north, and range No. (7) seven, east of the fourth principal meridian, containing 320 acres, be the same more or less, and being the tract granted by the United States of America to the aforesaid Ziba Parmely, late a private in Capt. Tilden's co., 37th inf'y, war of 1812, by letters patent, bearing date of July 29th, 1818, and founded upon warrant No. 530, reference being made to said patent will more fully appear, wherein it is described as aforesaid, viz: The south half of section No. (36) thirty-six, township No. (12) twelve north, range No. (7) seven east, which is hereby conveyed to said party of second part, to have and to hold the said premises, with all the appurtenances thereunto belonging or in anywise appertaining to the only proper use,
86 benefit, and behoof of said party of the second part, his heirs and assigns, forever.

In witness whereof the said grantor has hereunto set his hand and seal the day and year first above written.

[L. S.] ZIBA his + mark PARMELY.

[L. S.]
[L. S.]
[L. S.]

Signed, sealed, and delivered in the presence of Benjamin Lombard, jr.

HOBART B. CAMP.

STATE OF CONNECTICUT, *Fairfield county, ss:*

I, David B. Beers, a justice of the peace and notary public in and for said county, do hereby certify that Ziba Parmely, personally known to me as the same person whose name is subscribed to the within deed, appeared before me this day in person and acknowledged that he signed, sealed, and delivered the said instrument of writing as his free and voluntary act and deed for the uses and purposes therein set forth.

Given under my hand and notarial seal this 14th day of August, A. D. 1854.

[SEAL.] DAVID B. BEERS,
Justice of the Peace and Notary Pablic.

87 STATE OF CONNECTICUT, *County of Fairfield, ss:*

On this fourteenth day of August, A. D. 1854, personally appeared before me, David B. Beers, a justice of the peace and notary public in and for said county, duly authorized to administer oaths, &c., Ziba Parmely, to me personally known as a creditable person, who, being duly sworn according to law, doth depose and say that he, the said deponent, is the identical Ziba Parmely who served as a private in Captain Tilden's company, 37th inf'y, war of 1812; that he was born in Newtown, Connecticut; was 21 years of age at the time of his enlistment, 5 feet 5 inches high, and a farmer by occupation; and that the deed he has this day given for his bounties' land claim, is the only deed ever given by him for said claim whatsoever, and that the above statement is strictly true to the best of his knowledge and belief.

In witness whereof, I have hereunto set my hand and seal the day and year first above written.

[SEAL.] ZIBA his × mark PARMELY.

Witness:
D. BEERS.

Sworn and subscribed to before me, David B. Beers, a justice of the peace and notary public. In witness whereof, I have hereunto set my hand and affixed my notarial seal this 14th day of August, A. D. 1854.

[SEAL.] DAVID B. BEERS,
Justice of the Peace and Notary Public.

88 STATE OF ILLINOIS, *Stark County, ss:*

I, Patrick M. Blair, clerk of the Circuit Court, and by law recorder of deeds, within and for the county and State aforesaid, do hereby certify that the foregoing is a true and correct copy of a deed and certificate of acknowledgment, and affidavit thereto, of record in my office, in book I, on pages 111 and 112.

In testimony whereof, I have hereunto signed my name and affixed the seal of said court, at Toulon, this fourth day of February, A. D. 1861.

[SEAL.] PATRICK M. BLAIR, *Clerk.*

The plaintiffs then called as a witness Emory A. Storrs, esq., who, being duly sworn, testified that he knew the parties, and had been counsel for the plaintiffs on the trial of this action at the July term, 1862; and at such trial Judge Purple, who was the attorney for the defendant, Smith, introduced and offered in evidence the deed of Ziba Parmalee to Edwin A. Lacey, heretofore given in evidence by the plaintiffs on this trial; and that such production by defendant's counsel was the first that the plaintiff's consul had seen of that deed on the trial.

89 The defendant's attorney then called as a witness the defendant, Nathaniel Smith, who, being duly sworn, testified as follows:

"After this suit had been commenced I was informed by George C. Bester that he had seen a deed for the land from the patentee to some one, and that inquiry was made for the deed, and, as I understood from my counsel, Mr. Purple, the deed was found with Mr. Kingsman at Quincy."

The counsel for the defendant then gave in evidence a letter from Mr. Browning to E. S. Smith.

Letter from Mr. Browning.

QUINCY, *Nov.* 18, 1863.

E. S. SMITH, esq'r, Chicago, Ill.,

DEAR SIR: There has been some delay in seeing Mr. Kingman, but he gives his consent, without hesitation, that you may use the deed as you desire; that is, have it filed in court and sent out with Dedimus. Mr. Kingman found the deed among the papers of the old Illinois Land Company. How it came there he has no personal knowledge. There was no connecting chain of title.

Truly yours,

O. H. BROWNING.

90 Endorsed: Filed Nov. 23d, 1863. Wm. H. Bradley, cl'k.

The counsel for the defendant then read in evidence the entire answer of said defendant in the chancery suit.

Answer of Nathaniel Smith.

In the Circuit Court of the United States for the northern district of Illinois.

The answer of the defendant, Nathaniel Smith, to the complainant's bill of complaint filed in this cause.

JOSIAH M. MILLS and FLORA M. MILLS
vs.
JAMES LOMBARD and NATHANIEL SMITH. } In chancery.

The said defendant, for answer to the said complainant's bill, says that, as he advised by counsel, and believes, the said complainant, Flora M. Mills, is not the owner in fee simple of the south half of section thirty-six, (36,) in township twelve (12) north, of range seven (7) east, in Stark county, in said complainant's bill described, nor otherwise. And the said defendant, further answering, says that he has not, nor has the said Lombard, to the best of his
91 knowledge, information, and belief, in any manner encumbered any title of the said complainants; he admits that, on the 14th day of August, A. D. 1854, Ziba Parmaele, to whom the said land was patented by the United States, on the 29 July, A. D. 1818, as stated in complainants' bill, by his deed of that date, conveyed for a valuable consideration the said land to the said James Lombard, which said deed was duly recorded in the office of the recorder of Stark county, on the 28th day of August, A. D. 1854, a copy of which said deed, marked "A," is hereto attached, and made part of this answer; the original will be produced upon the hearing of this cause; and this defendant denies that, to the best of his knowledge, information, and belief, the said Zeba Parmely ever sold the said real estate to the said Edwin Lacy, as stated in said complainants' bill, and received compensation therefor, in manner and form as stated in the said complainants' bill; and he further stated that in relation to said charge in said bill contained, he had no knowledge or information, except as follows: when this defendant bought said land of James Lombard, as hereinafter stated, he was informed that said
92 Parmalee and Lacy had at one time talked of a trade of the land for a cow, but that for some reason the bargain or attempted trade fell through, and no deed, conveyance, or instrument of writing whatever was made between the parties, and no money or property paid for the land; and this defendant sets up and insists, as a full defence to this suit and proceeding, that if any such contract of sale, as is stated in complainants' bill, was ever made, that the same was not in writing, nor was there, as between the parties thereto, any note or memorandum in writing made or executed by any of the parties to said supposed contract, or by any one thereto, by them or any of them duly authorized, and that the same is wholly null and void by the statute of frauds and perjuries of this State; and

this defendant sets up and insists upon the same, as a full defence, in this suit. And the said defendant, further answering, states that, except from the statements in the complainants' bill, he has no knowledge that, on the 24 November, 1854, the said Zeba Parmalee made and executed to the said Edwin A. Lacy a deed to the premises aforesaid, with the recitals therein contained in manner and form
93 as stated in the complainants' bill, no such deed or conveyance, or pretended deed or conveyance being attached to or made an exhibit with said complainants' bill.

Whether the said Edwin A. Lacy died, leaving a child and heir, and whether he, said Edwin, died, leaving a will and testament, as stated in said bill, and whether the said supposed heir, Andrew H. Lacy, devised or attempted to devise the proporty aforesaid to the complainant, Flora M. Mills, he, this defendant, has no knowledge, information, or belief, except as charged in the complainants' bill, no copies of said supposed conveyances or of the said supposed will appearing to be attached to, exhibited with, or referred to, in said complainants' bill. He therefore calls for strict proof of all the charges and allegations aforesaid.

And this defendant further answering says: It is not true, as stated in the complainants' bill, so far as he has any knowledge, information, or belief, that the said defendant, James Lombard, ever went to the town of Trenton, Fairfield county, Connecticut, or to any other place, to purchase said land of said Parmalee; and the defendant expressly denies that the said Parmalee did then and there, or at any other time or place, inform the said James Lombard that he had
94 sold the said land to the said Edwin A. Lacy, or to any other person, or that he did not own the said tract of land, or that the same belonged to the said Lacy.

And this defendant further answering says: That so far as he is advised and believes, the said James Lombard never, at any time, saw or had any intercourse whatever with the said Lacy, [Parmeley,] and that all the statements, in said bill contained, in relation to any such supposed conversations, are false and untrue.

This defendant however, further answering, admits that one Benjamin Lombard, jun., did purchase the said land of the said Zeba Parmalee, as agent for the said James Lombard, as he is informed and believes, and took the deed of conveyance hereto attached, marked "A," and before referred to. But he denies that, so far as he has any knowledge, information, or belief, any fraud was purpetrated, or any reprensentations made use of inconsistent with truth, in making said purchase, and states distinctly that all he ever heard or knew, in relation to the transaction, was that at the time of the said purchase by the said Benjamin, as agent for the said James Lombard, the said Parmalee, the patentee aforesaid, stated that he had
95 once contracted to sell the land to the said Lacy for a cow, or some other consideration, and that because a difficulty had arisen about the trade, in some manner in regard to ten dollars of the purchase money, the deed was never delivered, and the contract was abandoned.

And this defendant, further answering, says that James Lombard and his wife, by their deed dated Dec. 7, 1835, a copy of which is hereto attached and made part of this answer, marked "B," conveyed the said land to this defendant. This defendant will produce and prove the original deed upon the hearing of the cause.

And this defendant, further answering, says that he purchased the said land in good faith, fully believing, as he now also believe that the said James Lombard had a full and perfect title to said land, and that he paid for the same the full and entire consideration of nineteen hundred dollars, without any knowledge, expectation, information, or belief that any person other than his vendor had any legal or equitable interest in or to the same; having seen that the deed from the patentee to James Lombard was made and recorded prior to any other pretended conveyances, he was advised by counsel, and believed the same to be true, that he was procuring a perfect, legal and equitable title to the land.

96

And this defendant, further answering, says that about the time of the date of the said conveyance from the said Lombard to him, he entered upon the said premises, and has paid taxes thereon for three years last past, and in improving and cultivating the same, has expended at least the sum of four thousand dollars, all which has been done in good faith, and without any knowledge, information, or belief that any other person had any legal or equitable claim to said land.

And this defendant, further answering, says that he was also further induced to purchase the said land by an affidavit of the said Ziba Parmely, which was exhibited and shown to him at the time he purchased of the said James Lombard, a copy whereof is hereto attached, marked "C," and made part of this answer, and which induced him fully to believe that he was purchasing the entire, legal, and equitable title to said land.

This defendant, further answering, denies that the said Lombard did in any manner defraud or attempt to defraud the said Edwin A. Lacy, or any other person, in procuring the said conveyance from the said Parmalee. The defendant admits that he has entered into and taken possession of the premises under his deed aforesaid. But he denies all combination, fraud, and conspiracy in said complainants' bill charged, and prays that the said complainants' bill may be dismissed.

97

And this defendant also prays that this his answer may be taken, considered, and adjudged as a special demurrer to the complainants' bill, because no exhibits purport to have been filed with the complainant's bill, and because the same has no equity on its face, and also for the reason that this court has no jurisdiction of the parties to the suit, one of the defendants being a citizen and resident of Massachusetts.

And having fully answered, he prays to be dismissed, with his costs.

NATHANIEL SMITH.

STATE OF ILLINOIS, *Peoria County, ss:*

Nathaniel Smith, being duly sworn according to law, doth say that the foregoing answer by him subscribed, and the facts and statements therein made, are true, to the best of his knowledge, information, and belief, and further saith not.

98 Subscribed and sworn to before me this 26th day of May, A. D. 1858. Witness my hand and official seal.

[SEAL.] N. H. PURPLE,
Notary Public Peoria City, Ill's.

Exhibit "A."

Ziba Parmalee to James Lombard.

This indenture, made this fourteenth day of August, in the year o our Lord one thousand eight hundred and fifty-four, witnesseth that Ziba Parmely (late a private in Captain Tilden's company, 37th regiment of infantry) war of 1812, of the county of Fairfield and State of Connecticut, party of the first part, in consideration of the sum of one dollar cash in hand paid by James Lombard, of the county of Suffolk and State of Massachusetts, party of the second part, the receipt of which is hereby acknowledged, do hereby release, grant, bargain, and quit claim unto the said party of the second part his heirs and assigns, forever, all that all certain tract of land, situated in the tract appropriated for military bounties in the State of Illinois, for
99 the war of 1812, being south half (S. $\frac{1}{2}$) of section No. (36), in township No. (12) twelve north, and range No. (7) seven east of the fourth principal meridian, containing 320 acres, to be the same more or less, and being the tract granted by the United States of America to the aforesaid Ziba Parmely, late [late] a private in Captain Tilden's company, 37th inf'y, war of 1812, by letters patent, bearing date of July 29th, 1818, and founded upon warrant No. 530, reference being made to said patent, will more fully appear, wherein it is described as aforesaid, viz: the south half of section No. (36) thirty-six, township No. (12) twelve north, range No. (7) seven east, which is hereby conveyed to said party of second part. To have and to hold the said premises, with all the appurtenances thereunto belonging or in anywise appertaining, to the only proper use, benefit, and behoof of said party of the second part, his heirs and assigns, forever.

In witness whereof the said grantor has hereunto set his hand and seal the day and year first above written.

his
ZIBA + PARMELY.
mark.

Signed, sealed and delivered in the presence of—
BENJAMIN LOMBARD, Jr.
HOBART B. CAMP.

100 Exhibit B.

James Lombard and wife to Nathaniel Smith.

This indenture, made this seventh day of December, in the year of our Lord one thousand eight hundred and fifty-five, witnesseth that James Lombard and Mary C., his wife, of the county of Suffolk and State of Massachusetts, parties of the first part, in consideration of the sum of nineteen hundred dollars in hand paid by Nathaniel Smith, of the county of Peoria and State of Illinois, part of the second part, the receipt of which is hereby acknowledged, do hereby alien, release, demise, and quit claim unto the said party of the second heirs and assigns, forever, that certain tract of land known and described as being the south half of section (36) thirty-six, in township (12) twelve north, and range (7) seven east of the 4th P. M., lying and being in the county of Stark and State of Illinois. To have and to hold the said premises, with all the appurtenances thereunto belonging or in anywise appertaining, to the only proper use, benefit, and behoof of said part of the second part, heirs and assigns, forever.

In witness whereof the said grantors have hereunto set their hand and seal the day and year first above-written.

101 [SEAL.] JAMES LOMBARD.
[SEAL.] MARY A. LOMBARD.

Exhibit C.

STATE OF CONNECTICUT, *County of Fairfield, ss:*

On this fourteenth day of August, A. D. 1854, personally appeared before me, David B. Beers, a justice of the peace and notary public in and for said county, duly authorized to administer oaths, &c., Ziba Parmely, to me personally known as a creditable person, who, being duly sworn according to law, doth depose and say, that he, the said deponent, is the identical Ziba Parmely who served as a private in Captain Tilden's company, 37th inf'y, war of 1812; that he waa born in Newtown, Connecticut; was 21 years of age at the time of his enlistment, 5 feet 5 inches high, and a farmer by occupation; and that the deed he has this day given for his bounty land claim is the only deed ever given by him for said claim whatsoever, and that the above statement is strictly true, to the best of his knowledge and belief.

102 In witness whereof, I have hereunto set my hand and seal the day and year first above written.

[SEAL.] ZIBA his + mark. PARMELY.

Witness: D. B. BEERS.

Sworn and subscribed to before me, David B. Beers, a justice of the peace and notary public.

In witness whereof, I have hereunto set my hand and affixed my notarial seal this 14th day of August, A. D. 1854.

[SEAL.] DAVID BEERS,
Justice of the Peace and Notary Public.

Endorsed: Filed May 28th, 1858. Wm. H. Bradley, cl'k.

In the Circuit Court of the United States for the northern district of Illinois.

Amended answer.

JOSIAH M. MILLS and FLORA MILLS
vs.
JAMES LOMBARD and NATHANIEL Smith. } In Chancery.

The amended answer of the defendant, Nathaniel Smith, to
103 the complainants' bill of complaint filed in this cause.

The said defendant, by leave of the court first had and obtained, for further answer to the said complainants' bill, says:

That at the time he purchased the said land in controversy in this suit of the said James Lombard, and at the time of the said conveyance of the same by the said James Lombard to him, he had no knowledge, information, or belief whatever that the said Ziba Parmely had ever made previously thereto any sale, deed, or conveyance, whatever, or any contract therefor, of said land, to Edwin A. Lacy, or to any other person; and he explicitly denies that, at the time of his purchase aforesaid, he had any knowledge, information, or belief of the alleged deed from Zeba Parmely to Edwin A. Lacy, dated the 24th Nov., 1854, as stated and set forth in the complainants' bill. And now, having fully answered, he prays as in his original answer he has heretofore prayed.

NATHANIEL SMITH.

STATE OF ILLINOIS, *Peoria County, ss:*

This day personally came before me, a notary public of the city of Peoria, Nathaniel Smith, who, being duly sworn, says the
104 foregoing amended answer by him subscribed is true in substance and in fact.

Witness my hand and official seal this eleventh day of March, A. D. 1863.

[SEAL.] JAMES S. BARKMAN,
Notary Public in and for the City of Peoria, in the State of Illinois.

Endorsed: Filed March 13th, 1863. Wm. H. Bradley, cl'k.

Counsel for defendant, further to maintain the issue on the part of the defendant, further examined the defendant, who testified as follows:

I am the defendant in this suit, and claim to own the land in question. I purchased the land at Henry, at Lombard's office. It was previous to getting the deed from James Lombard, about one or two years before I got the deed, and sometime after the deed from Parmely to Lombard; I think it was the same fall Lombard purchased. I purchased by contract of Lombard, and paid down five hundred dollars. I agreed to give nineteen hundred dollars. I went to Lom-

bard's office and examined their land books and saw the deed
105 from Parmalee to Lombard. I looked at the books, and saw old tax titles, and was shown the deed from the old soldier to Lombard. I went into possession of the land about two years before date of deed from Lombard to me.

I did not have notice at the time of the purchase of any deed from Parmalee to Lacy. I made fence on the land and built a small house thereon, and made some hedge fence.

Here the defendants' counsel closed the examination of this witness, and he was then cross-examined by counsel for the plaintiffs. Witness, Smith, on cross-examination, further testified as follows:

I heard some way of the deed from Parmalee to Andrew H. Lacy; I think about a year before I got my deed from James Lombard; it may have been longer. I went to Toulon, the county seat of Stark county, soon after hearing of the deed from Parmalee to A. H. Lacy, and looked at the records in the recorder's office, and there found the deed from Parmalee to A. H. Lacy recorded. I read the deed upon the record books through to see what it contained. This was before I paid any more money to Lombard. I paid some money to Benjamin Lombard at the Sherman House, in Chicago. I paid some
106 money at the bank in Henry, and some, I think, to Mr. Ferguson, a clerk in Lombard's office. I never saw James Lombard; the business was done at Benjamin Lombard's office, in Henry. The second payment was made some months after I had heard of the conveyance to Andrew H. Lacy; cannot tell how long before. The last payment was about six hundred dollars in gold, and some currency; can't tell how much currency. I have about one or one and a half miles of hedge. I think the land worth forty dollars an acre; there is half section, three hundred and twenty acres.

Here cross-examination closed; and then counsel for defendant, Mr. Weed, asked the witness the following questions;

Do you know that you have told two stories about your knowledge of the deed from Parmalee to Andrew H. Lacey?

To which the witness answered that he did not know it.

When Mr. Weed said to witness that he had, and then put the following question:

Did you have any notice of the deed from Parmalee to Andrew H. Lacey prior to your purchase?

To which the witness answered, No.

The counsel for the plaintiffs further interrogated the witness, and he then testified as follows:

107 The last payment was $600 in gold, and some currency; cannot tell how much of each; it was about all the money I had, I think. The second payment was made about six months, not more than a year, after the first payment. I can't say whether there were more than two payments after the first or not. I commenced making improvements before I got the deed. I had put up a small house, and rented it. When I came to Chicago to see Lombard, it

was about the payments. I heard about the deed to Andrew H. Lacy, and went to Toulon and examined the records of it before I paid anything more than the first payment. I think this was a year or more before I got my deed.

The proofs in the case here closed; and thereupon the court instructed the jury, in substance, as follows, that is to say:

The land was patented originally to Zeba Parmalee. The plaintiffs, title is by virtue of a deed from Zeba Parmalee to Edwin A. Lacey, in February, 1837; which deed, however, has never been recorded. As is shown by the evidence, Andrew H. Lacey was the heir of
108 Edwin A. Lacey. No question is made upon this point, nor on this—that Andrew H. Lacey, by his will, devised the property to one of the plaintiffs, Flora M. Mills, wife of Josiah M. Mills. This is the title of the plaintiffs, and it is not controverted, on the part of the defendant, that it would be a good, legal, subsisting title, independent of the recording laws.

The defendants' title consists of a deed from Zeba Parmalee to James Lombard, dated the 14th of August, 1854, and recorded the 28th of that month and year; a deed from James Lombard, the grantee of this last deed, to the defendant, December, 7, 1855. The deed of 1837, from Parmalee to Lacey, not being recorded at the time the deed was made by Parmalee to Lombard, the first question to be determined is, was Lombard a bona fide purchaser, within the meaning of the recording laws? Those laws provide that every deed shall take effect from the time it is filed for record, as against creditors and subsequent purchasers without notice. This deed, not having been recorded, from Parmalee to Edwin A. Lacey, in August, 1854, the first question for you to determine is, was James Lombard a purchaser without notice of the previous conveyance made to Edwin A. Lacey, and had he paid value for the land? The evidence upon that point consists of the testimony of Ziba Parmalee
109 and Benjamin Lombard, jr. I think their depositions contain all the evidence which have any bearing upon this question of actual notice to Lombard. Of course, Benjamin Lombard, jr., being the agent of James Lombard in his purchase, notice to Benjamin is notice to James Lombard.

It is necessary that James Lombard, or Benjamin Lombard, jr., should have had notice of the previous conveyance to Edwin A. Lacey, or of some fact sufficient to put a prudent man upon inquiry. In other words, there must have been good faith on his part when he made the purchase.

The question for you to determine upon all the testimony, taking it together—the deposition of Lombard, the affidavits of Parmalee, and the depositions of Parmalee—is, whether there was any knowledge brought home to Benjamin Lombard, jr., that there had been a transfer, legal or equitable, made of this land to Edwin A. Lacey? If that fact was brought home to him, or if any fact that would warrant a prudent man in coming to the conclusion that there was a valid transfer, then he could not be said to be a purchaser in good

faith; and of course the registry laws did not protect him in the purchase. If he was a purchaser in good faith, then it makes
110 no difference whether Smith was or was not, because his purchase protects Smith—he having purchased from him; but if he was not a purchaser in good faith, the next question is, Did Smith purchase in good faith? The same rule is applicable substantially to him as to Benjamin Lombard, jun., the agent of James Lombard. It is necessary that he should have purchased the land and paid the money for it without knowledge of this previous deed. If he knew of the existence of this previous deed to Edwin A. Lacey, or had knowledge of any fact which would satisfy a prudent man, so as to put him upon inquiry that there was a valid sale made to Edwin A. Lacey before he paid the purchase-money, then he could not be considered a purchaser in good faith.

But it is contended, on the part of the plaintiffs, that inasmuch as there was a deed from Ziba Parmalee to Andrew H. Lacey on record on the 25 November, 1854, and as that recited that he had made a conveyance or transfer of the land to Edwin A. Lacey many years before, that was constructive notice to the defendant of the conveyance. I am hardly prepared to admit that, as a rule of law. If he had read this deed, or the record of it, or saw it; if, in other
111 words, he had actual notice, then, as a matter of course, he would be bound by it, so far as such recital could bind him; but I hardly think that the fact it was simply on record, would be constructive notice to him, so as to prevent him, from being a bona fide purchaser.

Mr. Parmalee, when the recital was made, had no title to the land, according to the record, because the deed to James Lombard was recorded the 28th of August, 1854, before this deed was made to Andrew H. Lacy, and it would be a hard rule, it seems to me, to hold that the recital in a deed attempting to convey land which the man had no right to convey would operate as constructive notice to a third party. Therefore, the court instructs you that it was necessary that Mr. Smith should have had actual notice of this previous deed, or of some fact which would satisfy a prudent man that there had been a transfer of the land, before he paid the purchase money. If he had, then he would not be a purchaser protected by the registry laws; if he had not this notice, then he would be protected, whether Mr. Lombard was a bona fide purchaser or not, because the rule you will understand to be this, as counsel on both sides admit, that
112 the defendant can protect himself by showing that Lombard is a bona fide purchaser without notice, or that he himself is a bona fide purchaser without notice.

Mr. Weed, defendant's counsel. I would ask the court specifically to instruct the jury as follows:

1. That if Zefa Parmalee did inform James Lombard that he had sold the land in controversy to Lacey twenty or twenty-five years before, but had not deeded it, Lombard was justified in buying the land and receiving a deed therefor, because of the lapse of time and

the statute of frauds, and such purchase would be proper, as Parmalee was at liberty to deny or avoid the agreement.

2. That the elder Lacey was guilty of wrong and imprudence in neglecting to have his deed recorded. If he wished to claim the land, he should have recorded his deed, or in some other manner given notice of its existence.

3. Unless Lombard was able to ascertain, upon proper inquiry, that a sale and deed had been made from Parmalee to the elder Lacey, he had a right to purchase the land; and if the younger Lacey acknowledged that no deed had been made to the elder Lacey, then there was no way in which Lombard could ascertain that a
113 deed had been made; and if Lombard could not ascertain, upon proper inquiry, that the land had been deeded, then he had a right to purchase, and the deed to him is valid.

The Court. I think I have substantially given the law upon the subject of these points already.

Mr. Weed. The only idea is, that nothing has been said about the lapse of time, and that an equitable title to the land, after twenty years, should have been shown by writing.

The Court. I think they should be satisfied that there was a claim that could be enforced.

Mr. Knowlton. There was no twenty years about it; there was no such time elapsed.

The Court. I can only repeat what I said before, that Lombard must have been informed there was a valid, subsisting title to this land in Lacey. I do not know that I could express it in any different language from that I have already used. Of course it was the duty of Lacey to have had his deed recorded, if he wanted to protect himself against just such acts as really were done in this case; that is to say, it is the duty of every man, if he wants to protect himself against a deed subsequently to be made by his grantor, to
114 have his deed recorded.

Gentlemen, you will see that the question turns entirely on the view you may take, from the evidence, upon the fact whether these two persons are purchasers in good faith, without notice; that is, Benjamin Lombard, jr., and the defendant. If either of them is a purchaser in good faith, then the defendant is protected. You must find that they both had knowledge, before you can find a verdict for the plaintiff. If they both had knowledge of this pre-existing title, then, as a matter of course, the plaintiffs' title stands good, otherwise not.

Error.

The counsel for the plaintiffs then and there excepted to instructions given by the court to the jury, in this, to wit:

1st exception. To that part of the instructions where the court says, "It is necessary that James Lombard, or Benjamin Lombard, jr., should have had notice of the previous conveyance, or of some fact which satisfied them, or either of them, that there had been a

valid transfer of the land, or a valid incumbrance upon the land, to Edwin A. Lacey."

2nd exception. To that part of the instructions where the
115 court says, "The question for you to determine upon all the testimony, taking it together—the deposition of Lombard, the affidavit of Parmalee, and the depositions of Parmalee—is whether there was knowledge brought home to Benjamin Lombard, jr., that there had been a transfer, legal or equitable, made of this land to Edwin A. Lacey."

3rd exception. To that part of the instructions where the court says, "If he was a purchaser in good faith, (meaning Lombard,) then it makes no difference whether Smith was or was not, because his purchase protects Smith."

4th exception. To that part of the instructions where the court says that the record of the deed from Parmalee to Andrew H. Lacey, in November, 1854, was not constructive notice to Smith, the defendant, and that it was incumbent upon the plaintiffs to show that Smith had actual notice of the previous deed, or some fact which would satisfy a prudent man that there had been a transfer of the land, before he paid the purchase money.

5th exception. To that part of the instructions where the
116 court says, "It was necessary that Mr. Smith should have had actual notice of this previous deed. If he had not this notice, then he would be protected, whether Mr. Lombard was a bona fide purchaser or not; that it is incumbent on the plaintiff to show that he had notice of the execution of this previous title."

6th exception. To so much of the instructions of the court which go to inform the jury that Lombard's title would be good, unless the plaintiffs show that he had notice of a conveyance or transfer of the land prior to his deed.

7th exception. To that part of the instructions or statement of the court, after Mr. Weed had remarked, "That the elder Lacey was guilty of a wrong and imprudence in neglecting to have his deed recorded; * * * and unless Lombard was able to ascertain, upon proper inquiry, that a sale and deed had been made from Parmalee to the elder Lacey, he had a right to purchase the land * * * *, and the deed to him is valid, 'I think I have substantially given the law upon the subject of these points already.'"

8th exeception. To that part of the instructions where the
117 court says, after the statement of Mr. Weed, "I can only repeat what I said before, that Lombard must have been informed there was a valid subsisting title to this land in Lacey."

Also, "you will see that the question turns entirely on the view you may take from the evidence upon the fact whether these two persons are purchasers in good faith without notice; that is, Benjamin Lombard, jun'r, and the defendant. If either is a purchaser in good faith, then the defendant is protected; you must find both had knowledge before you can find for the plaintiff.

9th exception. To all that part of the instructions which tended to inform the jury that the deed from Parmalee to Lombard would be

good, even if obtained under a false representation to induce Parmalee to give the deed, provided Lombard had no notice of a conveyance from Parmalee to E. A. Lacey; and all that part of the instructions which tended to lead the jury to understand that good faith in Lombard only related to the fact whether he had notice of Lacey's title or not.

Exceptions allowed.

[SEAL.] THOMAS DRUMMOND.

Endorsed: Filed May 25th, 1865. Wm. H. Bradley, clerk.

And on this day, to wit, the fifth day of November, A. D. 1867, came the said plaintiffs by their attorney, and filed their appeal bond, in the said entitled cause, which said appeal bond is in the words and figures following, to wit:

118 *Appeal bond.*

Know all men by these presents, that we, Ezekiel S. Smith and A. D. Titsworth, of Chicago, are held and firmly bound unto Nathaniel Smith in the sum of five hundred dollars, to be paid to the said Nathaniel Smith, his executors and administrators, to the payment of which, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, administrators, firmly by these presents.

Sealed with our seals, and dated this twenty-fifth day of June, in the year of one thousand eight hundred and sixty-seven.

Provided, however, that this obligation is upon this express condition that whereas Josiah M. Mills and Flora M. Mills have prayed an appeal to the Supreme Court of the United States, to reverse a judg-
ment rendered by the Circuit Court of the United States, for
119 the eighth circuit and northern district of Illinois, in a certain
cause, on the law side of said court, wherein Josiah M. Mills and Flora M. Mills are plaintiffs and the said Nathaniel Smith is defendant, in favor of said defendant.

Now, therefore, the condition of this obligation is such, that if the above-named plaintiffs shall prosecute their said appeal and writ of error to effect and [and] shall pay all costs if they shall fail to make good their said plea, then this obligation to be void, otherwise to remain in full force and virtue.

[SEAL.] E. S. SMITH.

[SEAL.] A. D. TITSWORTH.

Endorsed: Approved Thomas Drummond. Filed Nov. 5th, 1867. Wm. H. Bradley, cl'k.

120 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the Circuit Court of the United States for said district, hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said entitled cause, wherein Josiah M. Mills and Flora M. Mills are plaintifis and Nathaniel Smith is defendant, as the same appears of record remaining in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said Circuit Court, at my office in the city of Chicago, in said district, this sixth day of November, A. D. eighteen hundred and sixty-seven, and of our independence the ninety-second year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

121 Circuit Court of the United States, northern district of Illinois.

To the judges of the Circuit Court of the United States for the northern district of Illinois, greeting:

THE UNITED STATES OF AMERICA.

Because in the record and proceeding, as also in the rendition of a judgment in a plea which is in the said court before you, between Josiah M. Mills and Flora M. Mills, plaintiffs, and Nathaniel Smith, defendant, a manifest error hath happened to the great damage of the said Josiah M. Mills and Flora M. Mills, as by their complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, you are hereby commanded, if judgment be therein given, then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of December next, in the said Supreme Court, to be then and there
122 held, that the record and proceedings being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the law and custom of the United States, should be done.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this first day of November, in the year of our Lord one thousand eight hundred and sixty-seven, and of our independence the ninety-second year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

123 Supreme Court of the United States of America.—December term, A. D. 1867.

Assignment of errors.

JOSIAH M. MILLS, FLORA M. MILLS, plaintiffs in error, *vs.* NATHANIEL SMITH, defendant in error.	Error to the Circuit Court of the United States for the northern district of Illinois.

And afterwards, to wit, on the first Monday of December, in this same term, before the justices of the Supreme Court of the United States of America, comes the said Josiah M. Mills and Flora M. Mills, by E. S. Smith, their attorney, and say, that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error in this, to wit:

1st. The court erred in instructing the jury in this: "That it is

necessary that James Lombard or Benjamin Lombard, jr., should have had notice of the previous conveyance, or of some fact which satisfied them, or either of them, that there had been a valid transfer of the land, or a valid incumbrance upon the land, to Edwin A. Lacey."

124 2d. The court erred in instructing the jury in this: "The question for you to determine upon all the testimony, taking it altogether, the deposition of Lombard, the affidavit of Parmalee, and the deposition of Parmelee—is whether their was knowledge brought home to Benjamin Lombard, jr., that there had been a transfer, legal or equitable, made of this land to Edwin A. Lacey."

3rd. The court erred in instructing the jury in this: "If he was a purchaser in good faith, (meaning Lombard.) then it makes no difference whether Smith was or was not, because his purchase protects Smith."

4th. The court erred in instructing the jury in this: "That the record of the deed from Parmelee to Andrew H. Lacey, in November, 1854, was not constructive notice to Smith, the defendant, and that it was incumbent upon the plaintiffs to show that Smith had actual notice of the previous deed, or some fact which would satisfy a prudent man that there had been a transfer of the land, before he paid the purchase money.

125 5th. The court erred in instructing the jury in this: "It was necessary that Mr. Smith should have an actual notice of this previous deed. If he had not this notice, then he would be protected, whether Mr. Lombard was a bona fide purchaser or not; that it is incumbent on the plaintiffs to show that he had notice of the execution of this previous title."

6th. The court erred in instructing the jury in this: "That Lombard's title would be good unless the plaintiffs show that he had notice of a conveyance or transfer of the land prior to his deed."

7th. The court erred in instructing the jury in this: "That the elder Lacey was guilty of a wrong and imprudence in neglecting to have his deed recorded, * * * and unless Lombard was able to ascertain, upon proper inquiry, that a sale and deed had been made from Parmalee to the elder Lacey, he had a right to purchase the land, * * * and the deed to him is valid. I think I have substantially given the law upon the subject of these points al-

126 ready."

8th. The court erred in instructing the jury in this: "After the statements of Mr. Weed, I can only repeat what I said before, that Lombard must have been informed there was a valid, subsisting title to this land in Lacey." Also, "you will see that the question turns entirely on the view you may take from the evidence upon the fact whether these two persons are purchasers in good faith without notice; that is, Benjamin Lombard, jr., and the defendant. If either is a purchaser in good faith, then the defendant is protected; you must find both had knowledge before you can find for the plaintiffs."

9th. The court erred in instructing the jury in this: "That the

deed from Parmalee to Lombard would be good, even if obtained under a false representation to induce Parmalee to give the deed, provided Lombard had no notice of a conveyance from Parmalee to C. A. Lacey;" and all that part of the instruction which tended to lead the jury to understand that good faith in Lombard only related to the fact whether he had notice of Lacey's title or not.

127 10th The verdict of the jury was against the law and evidence in the case.

11th. The court erred in not granting the motion of the plaintiffs in the court below a new trial in the case.

12th. The judgment was against the law and evidence in the case.

And the plaintiffs in error pray that the judgment aforesaid, for the errors aforesaid, and other errors in the record and proceedings aforesaid, may be reversed, annulled, and for naught held, and that they may be restored to all things which they have lost by occasion of said judgment.

Nov. 25th, 1867.

E. S. SMITH,
Attorney for pl'ffs in error.

Endorsed: No. 307. Assignment of errors. Josiah M. Mills, Flora M. Mills, *vs.* Nathaniel Smith. Filed 2d December, 1867. E. S. Smith, att'y for pl'ffs in error.

128 UNITED STATES OF AMERICA, *ss:*

To NATHANIEL SMITH, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the eighth circuit and northern district of Illinois, wherein Josiah M. Mills and Flora M. Mills are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness, this 26th day of November, in the year of our Lord eighteen hundred and sixty-seven.

THOMAS DRUMMOND.

Endorsed: Citation. To Nathaniel Smith. Original. No. 307. Received, Peoria, Illinois, November 29th, A. D. 1867, a true and correct copy of the within citation. Nathaniel Smith, by H. M. Weed, his attorney. Filed 4 Dec'r, '67.

O

Supreme Court of the United States.

No. 156.

DECEMBER TERM, 1868.

JOSIAH M. MILLS,
FLORA M. MILLS,
Plaintiffs in Error,
vs.
NATHANIEL SMITH,
Defendant in Error.

Reply to Brief and Argument of Counsel for Defendant in Error.

E. S. SMITH, FOR PLAINTIFFS IN ERROR.

The defendant's counsel having furnished us with copy of his brief and argument for reply, we ask permission to make a few suggestions, to show the errors the learned counsel has, it seems to us, fallen into.

Counsel says, on page 6 of his brief, that the defendant, on cross-examination, is erroneously reported to have testified that after he had purchased of Lombard, and after he had taken possession and made his first payment, he heard of the deed from Ziba Parmely to A. H. Lacy, of the 14th of November, 1854, etc.

If the defendant has been so reported by us, we most certainly made a mistake, but we find no such statement in our argument. We claim that the defendant, in fact, heard of this deed before he made the purchase, in fact, and we think the dates will fully sustain us in that statement.

We referred to page 44, folio 106 of the record.

The defendant said: "I heard some way of the deed from Parmely to Andrew H. Lacy, I think about a year before I got my deed from James Lombard; it may have been longer."

The deed bears date December 7, 1855, acknowledged March 10, 1856, recorded October 12, 1858.

It will be seen that this deed bears date about sixteen months after Lacy's deed was recorded; the acknowledgment after that several months, and the defendant does not state when he received his deed, nor does he fix any time when he read the record, only about a year prior to his getting his deed, and it may have been longer. He says that he had made one payment of $500 down, and thinks it was before he paid any more money to Lombard. We fail to see any definite statement of time in this. On page 43, folio 104, the defendant seems to state more definitely. In speaking of the purchase, he says: "*It was previous to getting the deed from James Lombard, about one or two years before I got the deed, and some time after the deed from Parmely to Lombard. I think it was the same fall Lombard purchased. I purchased* by contract of Lombard, and paid down $500. I agreed to give $1,900.

"I went to Lombard's office, and examined their books, and saw the deed from Parmely to Lombard. I looked at the books and saw old tax titles, and was shown the deed from the old soldier to Lombard."

In this statement the defendant does not fix the date of his purchase, nor does he state that he purchased at the time he saw Lombard's books, and saw old tax titles, and was shown the old soldier's deed to Lombard. He says it was in the fall after Lombard's deed from Parmely. We say it may have been in the fall of 1854, and been after Lacy's deed was recorded, which was November 24, 1854.

But the defendant stated, in his answer in the Chancery suit, which was given in evidence by the plaintiff, as follows (see page 33, folio 81,):

"Having seen that the deed from the patentee to James Lombard was made and recorded *prior to any other pretended*

conveyance, he was advised by counsel, and believed the same true, that he was procuring a perfect and equitable title to the land."

Now, we say that this answer, having been drawn by Judge Purple, defendant's counsel, the statement, "Having seen that the deed to Lombard being *recorded prior* to any other pretended conveyance, is conclusive that he then must have seen the record of the deed to Andrew H. Lacy, or how could he have spoken of any other pretended conveyance, of having seen that Lombard's deed was prior to any other pretended conveyance?

Of course, the defendant must have seen the Lacy deed, and being advised by counsel that he could get a good title by purchasing of Lombard, as Lombard's deed was prior, he thought he was procuring a perfect title; therefore, we say that the defendant did have notice of that deed prior to his contract of purchase of Lombard. He would not have been very likely to have purchased first, and then applied to counsel to know if he could then obtain title after he had made the purchase. At any rate, we say that the defendant had knowledge before he had made payments, except $500.

Counsel for the defendant says, on page 16 of his brief, that when the deed from Parmely to Andrew H. Lacy was recorded, Smith was probably in possession of the premises, and had made valuable improvements thereon.

We say this is error, although the defendant says, on page 44, folio 105, that he went into possession of the land about two years before date of deed from Lombard to him, which would have been in the fall or winter of 1853–4, long prior to the deed to Lombard. This, we say, is an error of the defendant, and, as proof it, we refer to the defendant's deed from Lombard, in which it is stated that the defendant resided in Peoria county. This deed bears date more than a year after the deed to Lacy had been recorded. The defendant states, in his answer (see page 40, folio 96,) that he entered into possession about the date of his deed, so it must have been in 1855 that he took possession of the land in question. Counsel gives

a portion of the answer of the defendant in the Chancery suit, and then states, on page 6 of his brief, that "the defendant was placed on the stand and sworn to the same facts; that he also again denied that he had notice of the deed to Andrew H. Lacy from Parmely until long after his purchase. Counsel claims to have substantially stated the proofs upon both sides. In this we think that the learned counsel is mistaken, and greatly mistakened. As we have said in our first brief, and here repeat, that counsel put a question to the defendant, viz.: Do you know that you have told two stories about your knowledge of the deed from Parmely to Andrew H. Lacy? (See page 44, folio 106.) We will take no further time upon this point, asking the court to refer to the defendant's testimony in the record, commencing on page 43.

Counsel for the defendant makes an effort to sustain the testimony of Benjamin Lombard, Jr., and refers to the statement about a cow or a horse which proved worthless and not as represented, and that Parmely refused to give a deed, etc. In this, after all the efforts of counsel, he does not attempt to show that Lombard's statement is at all reasonable and consistent; nor does counsel attempt to explain why they did not, after Parmely had given his testimony, and then after the deed was found and attached to a commission to re-take Parmely's testimony, put cross-interrogations to test the statement of Parmely as to the fraud of Lombard, and the notice to him of the sale to Edwin A. Lacy. But to attract attention from the testimony of Lombard, counsel makes an attack upon Parmely's testimony, and on page 10 of his brief says that the deposition of Parmely taken in 1864, contradicts, in almost every particular, the one made in 1861, called the first deposition.

We submit, if the court please, that there is no contradiction in Parmely's testimony. (See answer to the 6th interrogatory, page 15, fol. 35.) He says: "Upon examining 'Exhibit "A,' and calling the circumstances to my mind, I am satisfied "I was mistaken in what I then said in regard to not giving "him a deed for the land." We say that if there ever was an honest an truthful correction made by a witness, this is one. Parmely had the old deed to look at to enable him to recall the

transaction to mind, and then said that he was satisfied he was mistaken in what he said in his first deposition in regard to not giving a deed. He says that Lombard told him that there was no deed on record from him to Edwin A. Lacy (see page 15). No doubt that statement of Lombard, and the long time that had elapsed, Parmely was not able to recall to mind all the facts, and so stated as the best of his recollection. No evil intention or purpose manifested in this; none whatever.

Lombard, in his testimony, did not manifest one hair of honesty compared with Parmley.

Counsel, on page 11 of his brief, refers to the first deposition of Parmely, where he says: "My memory *is very good*, "and my recollection is good and reliable as ever." We say that there is nothing uncommon or unreasonable in this. The strongest minds do not remember for seventeen years more accurately. The transaction shows that Parmely was a confiding man. He took the word of Lombard that the town where the land was situated wanted to get a deed from the old soldiers—and no doubt the statement of Lombard, that no deed was on record from him to Edwin A. Lacy, induced him to think that he had not given a deed. But he had not forgotten that he had sold the land to Lacy and had received his pay for it, and so told Lombard.

It is evident beyond controversy, that Lombard did tell Parmely that there was no deed from him to Edwin A. Lacy. Parmely says so, and Lombard did not deny it, therefore, we say, that the subject matter of a deed to Lacy was talked up by Parmely and Lombard; and, besides, Parmely says he said to Lacy that he did not know as he had any right to give any other person a deed. (See page 15, fol. 36.)

The answer of Parmely to 5th interrogatory, page 31, viz.: "I gave to Edwin A. Lacy the Warrant I got from the United "States Government." (No doubt meaning the Patent, as at another time, on page 15, he uses the word Patent. We fail to see any enmity in this.

Counsel says in answer to the 8th interrogatory, page 31, Parmely said, "I told him I had disposed of it to Edwin A.

Lacy, but had never given any deed." There is no such answer to the 8th interrogatory. The answer to the 9th interrogatory states the fact with others, and there it appears (see fol. 75, page 31) that Parmely informed Lombard that he had disposed of the land to Lacy. Lombard said to Parmely that *if he had not given a deed he could sell it again.* Here Lombard advised the old confiding man that he could commit a fraud—could do an act which Lombard knew to be a fraud upon Lacy. Take all the transaction together, it is clear that Parmely did not consider he was selling the land for value. He made no proposition to sell to Lombard. He did not seek a purchaser. He did not show any desire to sell. But supposed the town wanted a deed from all the soldiers owning land there. Lombard was on a hunt, and using any words which would induce Parmely to give a deed. What is called on the military tract, stealing a title. He paid $17.00, and said that was all the town would pay. Lombard nowhere denies this, and it must be conclusive that Parmely understood it was the town to whom he gave the deed, or for the town's gratuity, and not a sale to defraud Lacy's heirs.

Counsel refers to the 2d cross-interrogatory which was in commission about five years after the deed to Lombard, and thinks the answer given, stating a reason, is not satisfactory.

It will be remembered that in 1861 when he attempted to state what was done, it was about twenty-four years after the sale to Lacy and five years after Lombard had stated that no deed was on record, and the memory of Parmely, no doubt like every man, was defective. But when the deed was presented in 1864, and he had fully reflected upon the matter, he then said that he was satisfied he was mistaken about the deed. But there was no mistake about his informing Lombard that he had sold the land to Lacy and received his pay therefor, and that Lombard said to him that there was no deed on record, and that he could sell it again; and when Parmely said he did not know as he had a right to give any body else a deed for the land, as he had disposed of it to Edwin A. Lacy, who was then dead, Lombard replied that he did not care whether

he could or not if he would only give him a deed. (See page 15, folio 36). Lombard had an opportunity to deny this if he had dared to do so, but did not.

Counsel makes a great effort to show a corrupt change in Parmely as to the reason stated, when, in fact, it makes no difference with the real point in question.

Both dispositions where taken on interrogations and cross interrogations, and the witness left to his best recollections. Parmely when he testified did not have the assistance of counsel, as the defendant did, to suggest to him and inform him as to the points to consider in his mind. And as we have said when the deed was shown him and the transaction recalled to his mind he is able to state more fully; and because he is able so to state it, in no way conflicts or contradicts what he before said, but corrects the one error as to the deed, and well he might. If what Parmely stated was not the truth Lombard would never have let it pass without contradiction.

Counsel attempts to claim that Parmely states in his answer to the fourth cross interrogatory (page 32) incorrectly. How could he answer otherwise, as he did tell Lombard that he had sold the land, and that he had in fact given a deed to Andrew H. Lacy years prior. He did not deny stating to Lombard that he had sold the land.

It is not obvious, as counsel asks, that the testimony of Parmely is wholly worthless. The learned counsel has wholly failed to show the least thing unworthy of belief in this witness Parmely. The sophisms of counsel are transparent and fall with weight to sustain Parmely in everything he testified to in the second deposition.

Counsel says that Parmely insists that he told Lombard he had not deeded the land to Lacy; and so we have said, and so it is. Lombard was told that no deed was given to Lacy. This was an error, and counsel is entitled to all he can make out of that. What does counsel say respecting the instructions of the court as to a deed or conveyance to Lacy? When the record does not show any proofs on that point, except no deed given. Upon that point counsel is mute, he says nothing. Is it law to

instruct a jury upon a point when there is no proof? Is it law to instruct a jury that if they find or must find that Lombard had notice of a deed, when the proofs show he was told no deed had been given? As to a deed, it was not claimed by the plaintiffs that any notice existed in the testimony. But it was claimed and fully proved that Lombard was told that the land had been sold to Lacy, and paid for, and Parmely did not know as he had a right to give any body else a deed.

The testimony showed that Lombard was urging Parmely to give a deed, that Parmely did not want to do so; therefore there was no bargain and sale. The transaction was nothing more or less than the obtaining a deed by Lombard from Parmely in fraud and upon false representations.

The intention of parties is the polar star by which courts of justice are always to be guided in the construction of contracts. Then we say the deed to Lombard, because of the fraud, is void. There was no intention on the part of Parmely to make a sale of the land to cut off Lacy's heirs.

Counsel admits on page twelve of his brief that in the deed of conformation from Parmely to Andrew H. Lacy, dated November 14, 1854, it is distinctly stated that the land was sold by Parmely to Edwin A. Lacy about the 1st of October, 1835, and that no deed of conveyance was ever executed to him.

Counsel might have stated also that said deed contained other statements important to the issue. (See page 23 of record, "Exhibit A.")

Counsel claims as a rule of law, (see his brief, page 12), that the agreement to deed had been fulfilled and its force expended. It had expired when the deed was made: it was absorbed, annulled, cancelled and no longer in existence. Notice of the sale to Lombard was therefore useless and could avail nothing. This is very strange doctrine indeed, so far as notice to Lombard of the sale to Lacy being useless and availing nothing.

Is it possible that in this age of the world it can be said that notice to a party who is attempting to obtain a conveyance of land upon false representations, that the land had been sold and

paid for years prior to another, even if it were the fact that a deed had been given but forgotten, and the party acting and notifying the party upon the supposition that no deed had been given? Will such notice avail nothing when made to a party making a bonafide purchase for value, acting in good faith, aside from disregarding the notice?

Is it possible that such a purchaser can shield himself by saying, it is true I had notice of a sale of the land to another, but it was supposed that no deed had been given; but it turned out that a deed had been given in fact, therefore the contract or agreement to deed had been fulfilled and canceled by the giving a deed, although unknown at the time of the notice, and consequently the notice was of no avail. We shall not attempt an argument to show the utter absurdity of such a proposition as to the notice.

Counsel makes a point upon the statute of 1833, sec. 15, for the reason it does not contain the words "without notice," and seems to think that the words *bona fide purchaser for valuable consideration are meaningless.* But he admits that there was another statute in 1833 which contained the words "without notice."

We think the statute of 1833 cuts no figure in this case. The statute in force when Lombard obtained his fraudulent deed of course applies, and under that statute Lombard took nothing by his deed for reason of the notice shown to have been given him.

On page 8 of the counsel's brief he states that "a purchaser in good faith is one who pays his money believing he is getting a good title." Is it not mockery for counsel to claim that Lombard paid his money in good faith? He paid nothing. He said it was the town's money, $17, and if he paid anything more it would have to come from his own pocket.

The land was then worth, in fact, $6,000, and he contracted soon after to sell it for $1,900. Did not Lombard know the value of the land? If he had believed he had a good title he would never have sold the land for $1,900, and given only a quit-claim? No, Lombard well knew that he had a stolen title

—a title obtained by fraud—and did not believe it good, and expected it would be claimed.

Counsel says on page 13 of his brief, that it was "decided at a very early day in Illinois that as a general rule the deed first recorded must prevail over one of older execution, when made in good faith, and when it appears to have been the intention of the parties to convey again the same land which had been conveyed."

We think counsel has stated the rule too strongly, for the reason that when the parties intend to convey the same land the second time, it is a designed fraud. But we do not dispute the rule the courts have laid down under the recording acts in this country nor in Illinois.

The case cited by counsel in 4 Scam. 123, the court distinctly said that the statute did not give effect to the first recorded deed unless *the purchaser acted fairly and in good faith.* Did Lombard act fairly and in good faith? Not a bit of it. He acted falsely and in bad faith from the first to the last.

Principles of justice nor the policy of the law will allow Lombard to avail himself of his priority of record to supercede the plaintiff's claim, and thereby permit him to triumph in his fraud.

The statutes and the cases all refer to deeds. They were cases where deeds were known to be in existence. This case is different, as supposed when the notice was given. If the law presumes a deed, where it is known that a sale and payment has been made, then Lombard had knowledge or was bound to act as though he had been informed that a deed had been given, as well as that a sale had been made.

Counsel says, on page 16 of his brief, that all the recitals in the deed to A. H. Lacy were absolutely false, because the statement of the sale was in October, 1835, when it was in February, 1837, and no deed given, when it turned out that a deed had been given. We think this shows a hard case on the part of the learned counsel. A mistake of the two points after so many years is not at all surprising; but there was no mistake of the facts most material, viz: The sale, the payment, the

giving of the deed to the only heir of Edwin A. Lacy, who was entitled to the land by law.

The questions asked by counsel, on page 17 of his brief, we need not take time to answer. The reading of the deed on page 23 of record the court will there find sufficient answer to the questions put by counsel.

The statements in the deed were proper, and were proper matter of record. But if not, then it makes no difference, because the defendant testifies that he had read the deed on the records through, to see what it contained. This, we say, was notice to the defendant which cannot admit of any doubt.

St. John vs. Conger, 40 Ill. 535, settles this point. In that case a copy of a deed clearly not entitled to record, was put upon record, and the court said that if the party read the deed upon the record it should be held the same information he would have received from seeing it in the hands of a private individnal.

Counsel, on page 17 of his brief, says (speaking of the recitals in the deed) this was tantamount to saying to Smith, Your title is all right. The original sale to Edwin A. Lacy never was consumated until after the conveyance by Parmely to Lombard, and the deed from Parmely to James Lombard was, in point of fact, the first deed ever made—the first deed ever recorded, and as you purchased of Lombard you have nothing to fear.

We submit, if the court please, that the counsel's construction put upon the recitals in the deed, is most remarkable.

The deed, after stating the facts of the sale, the payment, the object and purpose of the deed, it contains the following words: "To have and to hold the premises with all the appurtenances unto the said Andrew H. Lacy, his heirs and assigns forever, so that neither I, the said Ziba Parmely, nor my heirs, *nor any other person under me or them*, shall hereafter have any claim, right or title in or to the premises, or any part thereof, but therefrom I and they are, by these presents, forever barred and secluded.

It is obvious that Parmely, after he gave the deed to Lom-

bard for $17.00, the town's money, had fears that he had done a wrong, and in the deed to the heir he had done all he could to counteract or prevent the injury. He proclaimed the sale, the payment, the deed to the heir to convey the land to whom it belonged, so that no one under him should have any title or claim to the land except Lacy, and to forever bar and seclude all others.

The defendant purchased with notice, the proofs being most clear and positive, and as counsel claims and cites cases at the close of his brief, to show that the defendant can shelter himself under the deed to Lombard.

We need not take any further time in this case—the law is well understood. A purchaser with notice must have in his grantor a shelter, honest, bona-fide, and for value, or it can do him no good. The defendant has nothing of the kind in Lombard. He had notice, and in fact got no title but in direct and positive fraud, falsehood and deception. Such a shelter, we say, is no protection to the defendant.

We should not have taken so much time in this case, but for the fact the plaintiffs are poor, deserving people, and the defendant's attempt to shelter himself under such a fraud as the books nowhere speak of.

We respectfully submit the case for the consideration of the court, praying that the judgment may be reversed.

E. S. SMITH,
Attorney for Plaintiffs in Error.

April 2, 1869.

SUPREME COURT

OF THE UNITED STATES.

DECEMBER TERM, 1868.

No. 156.

JOSIAH M. MILLS,
FLORA M. MILLS,
Plaintiffs in Error,
vs.
NATHANIEL SMITH,
Defendant in Error.

} EJECTMENT.

Error to the Circuit Court of the United States

FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF AND ARGUMENT FOR THE PLAINTIFFS IN ERROR.

E. S. SMITH,
Att'y for Pl'ffs in Error.

O. S. GULLEY'S STEAM PRESSES, 10 & 19 LARNED ST., DETROIT.

Supreme Court of the United States.

DECEMBER TERM, 1868.

JOSIAH M. MILLS,
FLORA M. MILLS,
Plaintiffs in Error.
vs.
NATHANIEL SMITH,
Defendant in Error.

EJECTMENT.

Error to the Circuit Court of the United States for the Northern District of Illinois.

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HISTORY OF THE CASE.

This was an action of ejectment brought by the plaintiff, January 24, 1861, against the defendant, to recover possession of the S. ½ Sec. 36, T. 12 N., R. 7 East, containing three hundred and twenty acres, situate in Stark Co., Ill.

This tract of land was a military bounty, granted by the Government to Ziba Parmely for services in the war of 1812; the patent issued July 29, 1818, to Parmely, he residing in the State of Connecticut.

February 11, 1837, Parmely sold the land to Edwin A. Lacy, and received pay in full therefor, and at that date executed and delivered a deed to Lacy conveying the land, which deed was never recorded, and at Lacy's death, May 20, 1848, there was not any information left to his family respecting the

location of the land, or of the deed. Lacy left a widow, now Flora M. Mills,—one of the plaintiffs,—and one son named Andrew H. Lacy.

August 14, 1854, Benjamin Lombard, Jr., one of the Lombard family, (known as military bounty land heretofore,) went to Mr. Parmely in Connecticut, and made representations which induced him to give a quit claim deed to James Lombard, another of the Lombard family, conveying the land in question, which deed was recorded August 28, 1854, in Stark Co., Ill.

November 14, 1854, William F. Lacy, a brother of the deceased, having heard of Lombard's visit to Parmely, and obtaining a quit claim deed for his military tract, which he had understood, years prior, had been sold to his brother, applied to Mr. Parmely and obtained a deed conveying the land to Andrew Lacy, son and only heir of Edwin A., deceased, which deed contained a recital and statement to the effect that the land had been sold to Edwin A. Lacy in his lifetime and paid for; that no deed had been given, or, if there had been, it was lost. This deed was recorded Nov. 25, 1854, in Stark county, Ill.

December 5, 1855, Andrew H. Lacy died, leaving a will, giving all his property, both personal and real, to his mother, which was duly proved and admitted to Probate.

The defendant claimed to have purchased the land of James Lombard, in 1854 or 1855, no definite date being shown, nor was there any written contract shown, he claiming to have paid a portion of the purchase price at the time James Lombard conveys the land to the defendant; date of the deed, December 7, 1855, acknowledges it March 10, 1856, which deed was not recorded until October 12, 1858.

At the July Term, a trial was had, and the defendant gave in evidence, to show a contradiction in Mr. Parmely's statements, a deed from Parmely to Edwin A. Lacy, dated February 11, 1837. This deed proved to be the property of the deceased, which the defendant had obtained from Mr. Kingman, of Quincy, Ill., he having found it among the papers of the old

Illinois Land Company. This was the first information the plaintiff had of the existence of the deed.

May 22, 1865, the last trial of the cause commenced, and closed the 25th, resulting in a verdict for the defendant.

PROOFS BY THE PLAINTIFFS AND DEFENDANT.

The plaintiffs gave in evidence the patent from the Government. (See page 11 of pr. record.)

The plaintiffs gave in evidence the last deed from Parmely to Edwin A. Lacy, dated February 11, 1837, (see pages 12 and 13 of record,) which deed was not recorded.

The plaintiffs also gave in evidence the deed from Parmely to Andrew H. Lacy, dated November 14, 1854, and recorded November 25, 1854. (See page 23 of record.)

The plaintiffs also gave in evidence the will of Andrew H. Lacy, bequeathing the land to his mother, Flora M. Mills, with certificate of Probate. (See page 19 of record.)

The plaintiffs also gave in evidence a deposition of Ziba Parmely—a second deposition—proving the deed of February 11, 1837, and correcting his testimony as to the giving of a deed. (See pages 14, 15, 16 and 17.)

The plaintiffs also gave in evidence a deposition of Bryant Smith, the person who took the acknowledgment of the deed of February 11, 1837. (See pages 18 and 19.)

The plaintiffs also gave in evidence a deposition of Flora M. Mills, one of the plaintiffs, and Wm. F. Lacy. (See pages 21, 22 and 23 of record.)

BY THE DEFENDANT.

The defendant gave in evidence a deed from Ziba Parmely to James Lombard, dated August 14, 1854; recorded August 28, 1854. (See page 25 of record.)

The defendant gave in evidence an affidavit of Parmely, as alleged, for identification only. (Page 26.)

Also, a deed from James Lombard to himself, dated Decem-

ber 7, 1855, acknowledged March 10, 1856, and recorded October 12, 1858, and a deposition (*exparte*) of Benjamin Lombard, Jr. (See pages 26, 27, 28 and 29.)

The defendant gave in evidence a deposition of Zeba Parmely, which was taken by the plaintiff on Interrogations and Cross-Interrogations, before the deed of February 11, 1837, was known to exist. (See pages 30, 31, 32 and 33.)

The defendant then rested his case.

BY THE PLAINTIFF—FURTHER PROOF IN THE CASE.

The plaintiffs then gave in evidence *a part of an answer* filed by the defendant in a chancery suit. (See page 33, folio 81.)

The plaintiffs also gave in evidence a deposition of D. B. Beers, proving a conversation between Parmely and Lombard. (See pages 34, 35.)

The plaintiffs then examined E. A. Storrs as a witnees, and gave in evidence a letter from O. H. Browning. (See page 37, folios 88, 90.)

The defendant then gave in evidence the full answer of the defendant upon the statement that the whole should go together as the admission of the defendant, if any. (See pages 38, 39, 40.)

Also, an amendment of the answer made after the first trial. (See page 43, folio 103.)

The defendant was then examined as a witness in his own behalf. (See pages 43, 44.)

The plaintiffs cross-examined the defendant in relation to the notice of the Lacy deed. (See page 44, folios 105, 106.)

The defendant, on cross-examination, said that he had heard of the deed from Parmely to Lacy, and went to Toulon, the county seat of Stark county, and looked at the records in the Recorder's office, and there found the deed from Parmely to Lacy recorded, and read the deed upon the record books through to see what it contained. This was before he paid the money to Lombard, etc., etc. (See page 44, folio 106.)

The question put to the defendant by his counsel, after the cross-examination, are of particular importance, and so, in fact, the answers are. (See page 44, fols. 106, 107.)

POINTS BY THF PLAINTIFF IN ERROR.

I.

The deed from Parmely to Andrew H. Lacy, only heir of Edwin A. Lacy, dated the 14th, and recorded the 25th of November, 1854, and the deed of February 11, 1837, which was lost and discovered in the possession of the defendant, should, under the circumstances, be considered together, and as of record, the 25th day of November, 1854, giving full title to the heir.

II.

The deed from Parmely to Lacy having been obtained upon false representations and with notice that Edwin A. Lacy had purchased the land and paid for it, was void, and conveyed no title whatever to Lombard, he being a wrong-doer, and guilty of a direct fraud upon Parmely as well as Lacy, and cannot be protected in a court of justice.

III.

The record of the deed from Parmely to Andrew H. Lacy, Nov. 25, 1854, containing recitals and statements directly connected with the title and sale to Lacy, was notice to the defendant of everything contained in the deed, therefore the defendant had no right to take a title from Lombard after November 25, 1854, to the prejudice of the plaintiffs.

IV.

The reading of the deed by the defendant upon the records of Stark county was direct and positive notice to him of all the deed contained, and was legally conclusive, from which he was advised that the land had been sold and paid for long prior, and that the deed, if any given, had become lost, and that the deed

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to Andrew H. Lacy was given to him as the heir of the deceased, and to give to him title to the land.

V.

Notice to the defendant, prior to his getting a title and prior to payment by him, of the sale to Edwin A. Lacy was sufficient to stop him in the purchase of the payments, and to render the deed obtained by the defendant, after such notice, void.

VI.

The verdict of the jury was manifestly against the evidence in the case; therefore the judgment should be set aside.

May it please the Court:

We shall assume, as the record fully shows, that the plaintiffs in error, in the Court below, made out their case upon the facts; that the record nowhere shows that the defendant made any question upon this point; that the only question in dispute was as to whether the deed to Lombard was obtained by fraud and with notice, and whether the deed to the defendant was obtained without notice of the plaintiffs' rights. We claim that the verdict of the jury would have been for the plaintiffs, but for the error of the learned judge in his instructions to the jury.

The instructions of the Court to the jury will be found on pages 45, 46 and 47 of the printed record, and the exceptions taken commence at the close of page 47, and follow on pages 48 and 49.

The first exception taken to the instruction of the Court to the jury, is to that part appearing on page 45, folio 109.

THE COURT SAID: "It is necessary that James Lombard or "Benjamin Lombard, Jr., should have had notice of the *previ-* "*ous conveyance to Edward A. Lacy*, or of some fact sufficient "to put a prudent man upon inquiry. In other words, there "must have been good faith on his part when he made the "purchase."

We think there is error in this part of the instructions, because it did not cover the whole point as to Lombard's acts and the notice he received at the time he applied to Parmely for a deed for the town, as he said. What inquiry did the Court mean? In order for a full understanding of the point we design to make upon this part of the instructions, it will be necessary to examine the testimony upon the point presented, viz.: the fraud of Lombard and the notice of a sale to Lacy.

PARMELY *testified* (see second deposition, taken August 12, 1864,) in substance as follows (see page 15, fol. 36,): "Some "time in 1854, a stranger called on me at my residence in New- "town, Fairfield county, Connecticut, and said his name was "Lombard. He asked me if I was a soldier in the war of 1812. "I told him I was. He said he was looking up old soldiers. He "said to me that the town where the land lay wanted to get "a deed from me for the land which was my soldier's right, and "the town had agreed to give seventeen dollars a head for a "deed to the old soldiers. He also said that the redemption "had run out, but that the town was willing to give something. "He said he wanted to buy, but he could not give any more "than the town gave. I told him that I thought he ought to give "more. He said he could not give any more; it was the town's "money. I asked him what the town wanted to get the deed "for. I don't remember his reply. I told him that I had dis- "posed of the land to Edwin A. Lacy, who was then dead, and "that I did not know that I could give any body else a deed. "Mr. Lombard said that he did not care whether I could or not, "if I would only give him a deed, he would give me the money. "We then went down to Squire Beers' office in Newtown, and "Mr. Lombard drew up a deed, and I signed it, and he gave me "seventeen dollars, and said that was all the town would pay, "and if he paid anything more, he would have to pay it out of "his own pocket. He paid me two dollars and a half more. "After I had executed the deed, Mr. Lombard said he wanted "me to make an affidavit that I was the identical Ziba Parmely "who served as a private in Captain Tilden's company, Thirty- "seventh Infantry, in the war of 1812. I told him I was willing

"to do so. He then drew up a paper, and I swore to it before "Squire Beers. I did not read the paper that I swore to; Lom- "bard read it."

WITNESS BEERS (see deposition, taken July 15, 1861,) testified in substance as follows: (see page 34, fol. 83.)

"Ziba Parmely, or some other person, called on me in New- "town and requested me, I think, to go to the postoffice to "take an acknowledgment of a deed. I went. But after I "got there, I hesitated, because I thought there was something "wrong about it. I understood, from some source, that Parmely "had conveyed and sold the land mentioned in the deed they "wished me to take the acknowledgment of, to Edwin A. Lacy, "then deceased, and had also delivered to Lacy the warrant ob- "tained by him (Parmely) from the United States Government, "and received his pay for it. My impression is that I received "this information from Parmely himself. I understood that the "sum Parmely received from Lombard was nominal. I heard "no conversation between Lombard and Parmely about a cow "or a horse; but it is my impression that the sale to Edwin A. "Lacy from Parmely was talked up between us there, but the "exact words I do not remember. *I distinctly remember that "from the conversation had in my presence that I was loth to "take acknowledgment of the deed*, and gave as an excuse that I "had no notorial seal, but was told that a scroll would answer "as well, and I finally, after being urged, asked Parmely and "Lombard if it was all right, and they said they were satisfied, "and I signed the deed as a witness and took the acknowledg- "ment of the same."

BENJAMIN LOMBARD, JR.—Deposition taken by the defendant, (*exparte*) April 16, 1861: (see pages 27, 28, 29.)

This witness, in his deposition, details a very lengthy and minute statement as to what Parmely said to him, but very little what he said or done himself. It will be seen that nearly all that Lombard states cannot be true. His story is so inconsistent that no one can believe it for a moment. The statement that Parmely, an old man, should, on his own motion, state that

he had never given *a deed, power of attorney, or any other kind of conveyance*, and that he should have so stated repeatedly on the way to the office of Justice Beers, is absurd and cannot be true. (See fol. 70.) Lombard denies notice, but does not give his own statements to Parmely which induced him to give the deed. Lombard says he found him in the hay field, *and after some conversation* "*as to his services in said war of* 1812-14, he "purchased of him (the said Ziba Parmely) for James Lom- "bard, of Suffolk county. State of Massachusetts, the south half "of section thirty-six, town twelve north, and range 7 east, in "the county of Stork and State of Illinois, * * and paid "him for same a valuable consideration in current bank bills, "*the exact amount of which he has forgotten.*" (See fol. 67, 68, page 28.)

Lombard said that Parmely told him that he had never given a deed for the land; that he had talked of selling it to a doctor for a cow or a horse; that the cow or horse proved worthless, and not as represented, and he refused to give a deed," etc. (See fol. 69, page 29.)

Now, if the Court please, it is important to note, in order to give proper effect to the testimony, that Lombard's deposition was taken April 16, 1861, a short time prior to the taking of the deposition of Beers and Parmely, and without cross-examination or notice of taking; that the deposition of D. B. Beers, who took the acknowledgment of the deed, was taken July 15, 1861, (see page 34, fol. 84,) in which he states that the sale to Lacy was talked up before the acknowledgment was taken between them three, Parmely, Lombard and the witness.

That the first deposition of Parmely was taken by the plaintiffs, on written interrogations and cross-interrogations, put by defendant's counsel, in July, 1861, which first deposition of Parmely the defendant gave in evidence. (See page 30, fol. 72.)

Ziba Parmely, in his first deposition, which was used by the defendant, testified, in answer to direct interrogations, as follows, as to the notice and what was said, we give the substance of the answers:

Parmely testified that he sold the land to Doctor Edwin A. Lacy, and took his note for the purchase money ; that he gave to Lacy the warrant he got from the United States Government; that he gave the deed to Andrew H. Lacy for the purpose of conveying the land in pursuance of the sale made to Edwin A. Lacy, in his life time. (See page 31, fols. 73, 74.

Parmely further testified : (fol. 75,) He (meaning Lombard) said to me that the town where the land lay wanted to get a deed from all the men owning land there, and had agreed to give seventeen dollars a head ; that the right of redemption had run out. I told him that I had disposed of it to Edwin A. Lacy, but had never given any deed. *He then said that if I had never given any deed that I could sell it again.* We then went down to Newtown street, to the office of D. B. Beers. Mr. Lombard drew up a deed, then I signed it. He paid me seventeen dollars, *and said that was all the town would pay*, and if he paid anything more, he would have to pay it out of his own pocket. He gave me two dollars and a half more for my time lost from my work in going down to Mr. Beers' office.

Parmely, on the cross-examination, denied everything stated by Lombard, on which he was interrogated as to the proposed trade for a cow or a horse, *and stated that he did tell Lombard that he had sold the land to Edwin A. Lacy*, but had not given a deed. It seems that this witness had forgotten the fact that he had given a deed to Lacy. He remembered giving him the warrant he got from the Government. It had been a long time, and he was an old man, 69 years old in July, 1861, when the deposition was taken, as he staed in fol. 79.

The second deposition of Parmely was taken August 12, 1864, and the defendant's counsel put cross-interrogations to the witness, but none in relation to the deposition and statements of Benjamin Lombard. This deposition was taken to prove the giving of the deed of October 11, 1837, the original deed attached to the commission for that purpose, which deed was supposed not to exist, but was found in the hands of the defendant's counsel, on the first trial. Parmely corrected his first deposition as to the deed, and, as counsel well knew, was interro-

gated as to the whole conversation between him and Lombard, and what was done. But, notwithstanding, counsel did not see fit to raise any question as to the fact of Lombard's false representations, as stated by Parmely in the first deposition, and sustained by Beers as to the conversation respecting the sale to Edwin A. Lacy. The statement of Lombard, as given by Parmely, and not denied by him, viz.: "*If he had not given a deed he could sell it again*," is considered evidence that Parmely did say to Lombard that he had sold the land to Lacy.

We have stated the testimony thus fully for the purpose of showing how Lombard obtained his deed from Parmely, for the reason that we relied upon the fraud proved to invalidate the deed to Lombard, even without notice of a prior existing deed from Parmely to Edwin A. Lacy, and that on showing notice to the defendant, there would not be any grounds upon which he could maintain his defence.

This case, as fully shown by the proofs, is far different from any one found in the books. Lombard was not a purchaser for value. He was an adventurer, a prowling, deceptive hunter of old soldiers' rights, representing that the town had agreed to give seventeen dollars a head for soldiers' rights—a false statement upon its face, and any one but a confiding old man would have seen the fraud; therefore, the Court, in its instructions, ought to have explained to the jury the rule of law applicable in cases of such fraud. The Court should have stated that a deed obtained upon such false representations was void—absolutely void, on which Lombard could not convey any title to the defendant on his having notice of Lacy's rights. The Court should have stated that it was not necessary that Lombard should have had notice or information that Parmely had given Lacy a deed; that notice of a sale to Lacy was sufficient to render the deed to Lombard void as to the plaintiffs, for the reason that Lombard had perpetrated a fraud, not only on Parmely, but Lacy's heirs, and the plaintiffs had a right to resist the deed for the fraud. The Court confined the notice to a previous conveyance to Edwin A. Lacy, or to some fact sufficient to put a prudent man upon inquiry, but did not state what inquiry, whether

as to a sale by Mr. Parmely, or a conveyance by deed, and from the instructions the jury understood it related to a deed solely. It is true the Court said there must have been good faith on Lombard's part when he made the purchase. The Court thereby treated the transaction as a purchase by Lombard, which should not have been done, as it was no purchase. It was nothing less than stealing a title by Lombard, as the defendant's counsel in the trial stated, and was forced to admit, but remarked, to help him out, that both parties were attempting to steal the title, and the only question was, which of them had stolen the best title. If the Court had left the matter to the jury, as first stated, viz.: That there must have been good faith on the part of Lombard, the verdict would have been different.

The second exception is to that part of the instructions appearing in the latter part of fol. 109, page 45.

THE COURT SAID: The question for you to determine upon all the testimony * * * "is whether there was any "knowledge brought home to Benjamin Lombard, Jr., that there "*had been a transfer, legal or equitable*, made of this land to Ed- "win A. Lacy. If that fact was brought home to him, or of "any fact that would warrant a prudent man in coming to the "conclusion that there *was a valid transfer*, then he could not "be said to be a purchaser in good faith, and of course the regis- "try laws did not protect him in the purchase."

In this instruction we think the Court erred. The words "knowledge brought home to Lombard of a transfer legal or equitable," most certainly misled the jury. It was plain that the jury understood that there was quite a material difference between knowledge and information, and then, as before, it was confined to a transfer, which the jury understood to mean a conveyance by deed, where the proofs, in fact, did not show that there was any pretense that a deed had been given at the time. In another part of the instruction, the Court used the words *valid transfer*. The Court did not instruct the jury what constituted a valid transfer, nor was a legal transfer, nor an equitable transfer, defined. The inference was most clear, that if the

NOTE.—It may be observed that the first exception does not follow the language of the instruction as printed. The reason is that the bill of exception was drawn and the exceptions taken written out before signed. The language used in the instruction was charged somewhat before signing, and the exceptions were not changed.

jury did not find that knowledge had been brought home to Lombard, that a legal or equitable transfer had been made by Parmely to Edwin A. Lacy, then Lombard was a purchaser in good faith. It was error for the Court to instruct the jury that they must find from the evidence that Lombard had knowledge of a transfer, when there was no evidence at all that a deed had been given. The notice was that a sale had been made and paid for, and the evidence fully showed fraud upon the plaintiffs' rights, which should not prejudice them.

We need not take further time to show the position of the case as to Lombard. If, under the proofs in this record, it can be said that Lombard was a purchaser in good faith, then we must say, good bye to justice and let fraud predominate. It cannot be possible that the courts of justice will protect Lombard in this deed, and deprive a poor woman of her property.

We will now consider the instructions as applicable to the notice to the defendant.

On page 46, fol. 110, the Court says: "If he was a pur-"chaser in good faith, (meaning Lombard,) then it makes no "difference whether Smith was or was not, he having purchased "from him. But if he was not a purchaser in good faith, the "next question is, did Smith purchase in good faith?"

In this, it seems to us, a great error exists, for the reason the Court had, prior to that, given the jury to understand what good faith was, as applied to Lombard, that it simply meant that Lombard must have had notice of a deed from Parmely to Edwin A. Lacy, at the time of obtaining his deed from Parmely, no matter how great the fraud, the false representations that the town wanted a deed, and offered seventeen dollars a head to the old soldiers, notice of a sale made no difference. If the Court had let the jury interpret the words good faith, as they understood the meaning as applied to the acts of Lombard, there would not have been any difficulty in a verdict. But, as we have shown, the Court confined the jury to the matter of notice to Lombard to apply to a conveyance, to a transfer, a valid transfer, and not a sale; so, of course, the jury said, and were bound to say from the charge, that Lombard purch

in good faith, for the reason that he had no notice at the time of an actual conveyance from Parmely to Lacy, although he did have notice that Lacy had purchased the land and had paid for it; therefore, the Court, having instructed the jury to find a fact, on which point there was no proof that a deed had been given, as then supposed, it was error. It is error to instruct a jury to find a fact from the testimony, when there is not any proof upon the point. If a sale made in fact, and of that proof of notice given, or of information received, and that fact raised the presumption that a deed was given, it might be otherwise, but the Court should have so instructed the jury, and should have told the jury that proof of a sale was sufficient in law to stop Lombard from making the purchase or from obtaining a deed, after such notice. Good faith could not have existed under such a state of facts.

We submit, if the Court please, that it did make a difference —a very wide difference, whether defendant had notice or not, as the proofs then stood in the case. Lombard had obtained the deed by fraud—by false representation, and had no valid title. He could not have made a successful defence upon his deed as against the plaintiffs, for reason of the fraud.

If this is the law, as we think it is, then the defendant could not be protected, as he had direct and positive notice, which amounted to knowledge, and it was legally conclusive upon him. The defendant, having read the deed to Andrew H. Lacy upon the record, he had notice of all it contained, and that prior to his purchase and payment.

This is a case far different from the cases in the books, where it appears that a subsequent purchaser acted in good faith and free from all fraud, paying a value and making the purchase at the instance of the grantor, leaving the only question of notice of a prior conveyance the only issue in the case to be determined on the trial. The Court asked the question, "Did Smith purchase in good faith?" and then said: "The same rule is ap-"plicable, substantially, to him as to Benjamin Lombard, Jr., "the agent of James Lombard." Here, we think, the Court fell into an error again, as the same rule did not apply to the defend-

ant as to Lombard, for the reason Parmely had given to Andrew H. Lacy a deed conveying the land in question, which deed was recorded prior to the purchase by the defendant, and prior to the payments, unless it may be a small amount, and that is doubtful. We think the defendant heard of the deed to Andrew H. Lacy prior to his purchase of Lombard and prior to his going to Lombard's office in Henry. This deed to Andrew H. Lacy was good, and placed upon the records November 25, 1854. It conveyed the lands pursuant to the sale to Edwin A. Lacy, and so appeared by its terms. (See page 23, folio 56 of record.)

The Court said that it was necessary that the defendant should have purchased the land and paid the money for it without "knowledge of this previous deed (meaning the deed "to Edwin A. Lacy). If he knew of the existence of this "previous deed to Edwin A. Lacy, or had knowledge of any "fact which would satisfy a prudent man so as to put him "upon inquiry, that there *was a valid sale made to Edwin "A. Lacy* before he paid the purchase money, then he could "not be considered a purchaser in good faith."

If the Court had in its entire charge made the same *reference to a sale* as in this last statement, and had instructed the jury that notice of *a valid sale* to Edwin A. Lacy was the same in law as notice of a deed, then there would have been no difficulty in the case. The jury did not and could not have understood the whole charge as to the land as stated above, viz: a valid sale. There was notice of a sale, a valid sale, from Parmely to Lacy to both Lombard and to the defendant, and of that there was no dispute or doubt. But the Court used the words conveyance, valid transfer, prior conveyance, etc., in all cases with two exceptions, when the proof showed that the notice was as to a sale and payment of purchase prior, and Parmely said he did not know as he had a right to give anybody else a deed.

If the Court intended that the jury should have understood as last stated, that notice of valid sale to Edwin A. Lacy was sufficient, then it was a great misfortune to the

plaintiffs that it did not appear all through the instructions. The jury, most certainly, from all the instructions, understood that the notice must be of a deed, a conveyance, and not of a sale and payment. Most clearly, the jury, under this instruction, could not have believed for a moment that the defendant was a bona-fide purchaser of the land in question, for the reason that the proofs fully showed that he did have notice of a valid sale made by Parmely to Edwin A Lacy prior to the deed to Lombard. The defendant testified that he read the deed from Parmely to Andrew H. Lacy upon the records of Stark County, which deed contained statements positvie to the point, therefore the verdict must have been based upon the instructions that Lombard was a bona-fide purchaser, without notice or knowledge of the existence of the deed from Parmely to Edwin A. Lacy, which was not supposed to be in existence at the time, and the parties in interest, acting upon that belief, obtained a deed to Andrew H. Lacy, the only heir of Edwin A. Lacy, deceased. There is no other theory upon which the verdict can be accounted for. The jury were told that it made no difference whether the defendant was, or was not, a purchaser in good faith, because Lombard's purchase protected him if he had no notice of a deed (not then given, as supposed, and as the proofs showed). This is the effect of the instructions, and so the jury must have understood it. In this dilemma the Court, by the instructions, placed the case beyond all doubt. Can there be any question of it? Can this Honorable Court, on reviewing the case, say there was no error? We think not.

The Court further instructed the jury (see the latter part of folio 110, page 46), stating what the plaintiffs claimed as to the effect of the deed from Parmely to Andew H. Lacy, when recorded. There is a slight error somewhere, as the plaintiffs did not claim that the recital in the deed showed that Parmely had conveyed the land to Edwin A. Lacy, but had sold it and received pay in full. (See page 23, folio 56.) The plaintiffs did not and could not claim what did not appear from the deed. Counsel for the plaintiffs did claim that the record

of that deed contained information, and was notice of all it stated, and that the statement was full and sufficient to advise the defendant of all facts necessary to stop him in his purchase of the land from Lombard. It was claimed that the deed was a notice to the defendant that Parmely had sold the land to Edwin A. Lacy, in October, 1837; that Lacy then resided in Brookfield, Fairfield county, Connecticut, and that he was, at the date of the deed, not living; that Andrew H. Lacy, of Bristol, Kenosha county, Wisconsin, was the only heir, and that the land was conveyed to him in pursuance of the sale to Edwin A. Lacy; that the notice was more than sufficient in law to put the defendant upon inquiry. Counsel also claimed that the record of the deed, having been read by the defendant as he testified (see page 44, folio 105), was notice to the defendant about which there could be no controversy, and that information was conclusive on the defendant. It was his own act. It was by his own testimony, made positive. Although the defendant's counsel, by a question put to him, "Do you know "that you have told two stories about your knowledge of the "deed from Parmely to Andrew H. Lacy?" (see page 44, folio 106) induced him to state that he had no notice. It was evident the defendant did not fully understand the meaning of notice. Still, upon this proof, the Court said to the jury: "If "he had read this deed (meaning the deed to A. H. Lacy upon "the record), or the record of it, or saw it, if, in other words, "he had had actual notice, then, as a matter of course, he would "be bound by it, *so far as such recitals could bind him.*" Now, if the court please, we say this instruction did not come up to the testimony at all. It is manifest that the instruction entirely misled the jury. After stating, if the defendant had read the deed upon the record, etc., then the Court said if, in other words, he had had actual notice, then, as a matter of course, etc. By this the jury understood that the reading of the record gave him no notice; it must be actual notice, etc., and then closed by saying, so far as recitals could bind him, but did not think that the fact it was simply on record would be constructive notice to him so as to prevent him from being a bona-fide purchaser.

We submit, if the Court please, that, as the testimony of the defendant showed that he had read the record through to see what it contained, and before he paid the money, it was positive evidence of notice, and the Court ought to have so instructed the jury, instead of doing away with the entire effect of the testimony, as the Court did do by the instruction. Why did the Court say: "*If, in other words, the defendant had actual notice*," unless the Court intended to qualify the words prior (used to confuse the jury) to actual notice? Why did not the Court tell the jury, that if the defendant had read this deed, or the record of it, or had received actual notice, then, as a matter of course, the defendant had notice, and he would be bound by it, and would not be a bona-fide purchaser. The testimony, beyond all dispute, went that far, and the law, as the proofs stood, should have been given to the jury, as we claim, full, clear, and without any doubt, and without any qualification *in other words*, etc. The Court then further instructed the jury (fol. 111) "that when the recital was made by Parmely in this deed, he had no title to the land * * * and held that it would be a hard rule," etc., * * and said, "Therefore the Court instructs you that it was necessary that *Smith should have had actual notice of this previous deed*, (meaning the deed of October 11, 1837,) or of some fact which would satisfy a prudent man that there had been a transfer of the land before he paid the purchase money."

We claim great error in this, and it is so manifest that we need not take any time to consider it. Notice may come from a stranger, if it is sufficient; such is the law in this country. But Parmely had a right to give a deed to the heir, as he supposed no deed had been given to the ancestor in his lifetime, and besides, Parmely did not suppose that he had sold the land by his giving a deed for the town for seventeen dollars. It was no bargain and sale by Parmely to Lombard.

From the instruction that the defendant should have had actual notice of the previous deed (meaning the deed of February 11, 1837), which was not known to exist until it was found in the possession of the defendant on the first trial, the jury

must have understood that notice should have come from the plaintiffs, or some one in direct interest, to the defendant, in form of what was considered usual notice; that information other than formal notice would be of no avail in the case.

The Court, in the instruction given, ignores the idea that the defendant's title could be effected at all by his reading the record of the deed to Andrew H. Lacy, dated November 14, 1854, which, in the clearest language possible, informed the defendant that the deed was made to Andrew H. Lacy, son and only heir of Edwin A. Lacy, for the purpose of vesting in him the legal title in perfection of the sale made in October, 1867, to his ancester, Edwin A. Lacy, who had paid the grantor therefor the full purchase price.

We submit, that the defendant had positive notice by reading the deed long before he purchased the land of Lombard, and before payment; that he had notice, positive and unqualified, which was legally conclusive of the fact that Andrew H. Lacy had received title to the land, and that it was conveyed to him to evidence a consummation of a bargain and sale made years prior, between Parmely and Edwin A. Lacy.

It is difficult to see how the learned judge fell into the errors he did in his instructions to the jury. That great error exists, the record fully shows. Perhaps we ought to notice the propositions of the defendant's counsel, at the close of the instructions to the jury. (See page 46, fol. 112 of record.)

The absurdity of the propositions of law suggested by the counsel is so manifest that they could not have done injury if they had been repudiated by the Court. The statement that twenty or twenty-five years (which did not exist by the proofs,) justified Lombard, because of the lapse of time and the statute of fraud; that Parmely was at liberty to deny or avoid the agreement; that the elder Lacy was guilty of a wrong in neglecting to have his deed recorded, and other propositions unheard of in law, under such a state of proofs as in this case existed. These suggestions the Court ought to have repudiated at once, instead of saying: "I think I have substantially given "the law upon the subject of these points already." To this

the counsel for the defendant said: "The only idea is, that "nothing has been said about the lapse of time, and that an "equitable title to the land after twenty years should have been "shown by writing."

The Court then said: "I think they should be satisfied that "there was a claim that could be enforced." Now, if the Court please, the testimony of Parmely did not show when he said the sale to Lacy was made. He told Mr. Lombard that he had sold the land to Edwin A. Lacy, who was then dead; so it did not appear from the testimony as any time was fixed in the notice to Lombard, and Lombard was bound to make inquiry, and go no further in his effort to get a deed. From the notice, he could have very easily ascertained the facts upon inquiry of the family or relatives of the deceased. He did not do it, but had to urge Mr. Beers to take the acknowledgment, who was loth to do so, as he (Beers) states in his testimony.

We think the statement of the Court, in answer to counsel for the defendant, viz.: That he had given the law substantially upon the points suggested, did tend to have the jury believe that the suggestion of counsel was law. The Court ought to have explained to the jury the claim, and advised the jury as to the claim proved, whether Lacy's heirs could enforce it or not. The jury had no rule of law laid down to them as to the validity of the claim, and the inference, no doubt, was that the claim could not be enforced by the heir of Lacy.

After this, the Court said to the jury: "I can only repeat "what I said before, that Lombard must have been informed "there was a *valid subsisting title* to this land in Lacy. I do "not know that I can express it in any different language from "that I have already used. Of course, it was the duty of Lacy "to have his deed recorded, if he wanted to *protect himself* "*against just such acts as really were done in this case;*" that is to say, "It is the duty of every man, if he wants to protect himself against a deed subsequently to be made by his granter, to "have his deed recorded."

Here, again, the Court used the words subsisting title to this land in Lacy, clearly confining the instructions to a title in

Lacy, which the jury must have understood to be a deed, a conveyance in writing, and not an equitable title or claim which could be enforced by Lacy's heir, and in this case, the plaintiffs'. It is evident that the Court was satisfied from the proofs in the case, that Lombard was a wrong-doer, from the remark, *just such acts as really were done in this case.*

It seems from the testimony, that Lacy had sent his deed to the old Illinois Land Company, as it was found among the papers of that defunct institution (see page 37, folio 89), no doubt for record and investigation, and having died, no one knew of it. The Company, going out of existence, no one had charge of the deed, or knew where it came from, and the recording was neglected. So it would seem that Lacy was not guilty of wrong as counsel attempts to make the jury believe by his request. Lacy had done what others do residing at a distance from the land. No doubt if Lacy had known that Lombard was a hunter after old soldiers, and was in the practice of representing to them that the town had agreed to give seventeen dollars a head to old disabled soldiers for deeds of lands which were their soldier's rights, he most certainly would have taken his deed in person to the recording office.

The closing remarks of the Court in stating, that "the ques-"tion turns entirely on the view the jury took from the evidence "upon the fact whether the two persons were purchasers in "good faith, without notice, that is, Benjamin Lombard, Jr., "and the defendant. If either of them is a purchaser in "good faith, then the defendant is protected," must have been understood by the jury to mean that the good faith referred to was simply, and nothing more, than that Lombard and the defendant, or one of them, must have had notice of the deed of October 11, 1837, which, as proofs showed, was not known to be in existance at the time. This we say, as the Court so often repeated, that the notice must have been of the existence of the deed, a conveyance, a transfer, a valid transfer, the jury understood good faith to exist in Lombard, and in the defendant in the absence of such proof. So we insist, that the Court ignored everything which proved the fraud

and notice of a sale from Parmely to Edwin A. Lacy, and a deed from Parmely to Andrew H. Lacy, the only heir of the deceased as applied to the defendant.

We desire to suggest to the Court one other view of this case. Is it not true that the fact of notice by Parmely to Lombard that he had sold the land to Edwin A. Lacy, and that he was then dead, carried with it the presumption of law that a deed had been given conveying the title. Was not Lombard bound upon that notice to understand that a conveyance had been made, and put himself upon inquiring, and then to go to the heirs and inquire of them as to the facts. If he had done so, he would have learned that Edwin A. Lacy had purchased the land of Parmely, his soldier's right, and had paid for it, and had received a deed, but no deed could be found after his death, and they did not know where the land was situated, except in Illinois, and did not know the description, and that Mr. Parmely could not give the description, nor the county where the land was. Lombard could have easily learned the fact that a deed had been given, as the family understood so. The fact that Parmely had told him that he had not given a deed should not have satisfied him, as he was not the person to so state. After he had notified him of the sale, Lombard should have gone further and inquired of the parties in interest as to the fact of a deed. When a party says that he has bargained and sold his farm, it is understood that he has parted with his title, that there must be a deed in existence, or, at any rate, that a deed once existed, which would be sufficient, even if it was lost. The proofs in this case having shown a legal title in the plaintiffs from Parmely to the lands in question. Deed October 11, 1837, supposed not to exist or lost, but did actually exist at the time, also a deed from Parmely to the only heir, and the will of the heir to Flora M. Mills, one of the plaintiffs, the only question then to have been determined was, did the defendant show a better title?

We submit that, from the testimony, there ought not to have been any doubt. Lombard had no equity whatever, the defendant had no equity as against the plaintiffs. To say the most of

Lombard's deed, it was, by his fraud, a mere color, and we say it had no color whatever but fraud. Lombard, by taking the deed after the notice he had received from Parmely of the prior rights of the heirs of Lacy, made him a *mala fide* purchaser, if he can be called a purchaser at all.

The defendant read the record, and was informed that the land had been, years prior, sold to Lacy, and that he was dead, and the deed lost, if any given, and that the conveyance to the son and only heir was given to supply the lost deed, if any had been given, if not, then to give him the title which the law declared him entitled to have, and would have had if the deed had not been lost. The deed having been found, then the title was shown to have been in the plaintiffs long prior to the deed to Lombard. If the Court please, we submit that the record shows manifest error, and that the judgment ought to be set aside.

Counsel may claim that it may be a great hardship to the defendant to lose the land. To that we will say that there will not, and need not be, any hardship on his part, for the reason Lombard is responsible, and, besides, the plaintiffs have offered the defendant to so arrange with him that he may have his improvements, provided a reasonable use of the land has not fully indemnified him for the improvements made, and will do so at any time. The hardship is upon the plaintiffs, who have, by a great fraud, been deprived for years of their land. The law is so plain and well defined as to notice and fraud in obtaining titles, and of the rights of parties in such cases, that we need not refer to cases in the books. But we will state a few points, and note a few leading cases upon notice and fraud in procuring the execution of conveyances.

It is a general rule and well settled, that when the notice or information is substantially equivalent to knowledge, it may come from third persons and be as effectual as it would be if it came from the parties in interest.

Curtis vs. Mundy, 3 Metcalf, 405.
Bowling vs. Ewing, 9 Dana, 76.
Roberts vs. Stanton, 2 Mumford, 129.
Lewis vs. Bradford, 10 Watts, 67.

A statement of any fact which shows that the title purchased, or about to be purchased, is subject to the legal or equitable claims of other persons, is sufficient notice, and will stop a purchaser after receiving such notice.

Repplier vs. Repplier, 1 Rowle, 386.

It is not necessary in any case to constitute notice that it should be in the shape of a distinct and formal communication.

Barnes vs. McChristy, 3 Penna., 67.
Doyle vs. Peas, 4 Scammon, 202.

Whatever is sufficient to direct the attention of a purchaser to the *prior rights and* equities of third persons and to enable him to ascertain their nature by inquiry, will operate as notice.

Sigourney vs. Mann, 7 Conn., 324.
Booth vs. Barnum, 2 Conn., 186.
Hawley vs. Cramer, 4 Cowen, 717.
Doyle vs. Peas, 4 Scammon, 202.
Blaisdell vs. Stearns, 16 Vermont, 179.
Stafford vs. Ballou, 17 Vermont, 329,

Notice to an agent is the same as to the principal, as the principal cannot be allowed to avail himself of an interest acquired by the fraud of his agent in prejudice of the rights of third parties.

A purchaser without notice must not only be so at the time of the contract or conveyance, but at the time of the payment of the purchase money.

8 Wheaton, 450.

A purchaser, with notice of a deed, is bound by all its contents.

The general doctrine is well settled in this country as well as in England that a purchaser of a legal title will be liable to all equities of which he had actual or constructive notice at the time of the purchase.

Wormly vs. Wormly, 8 Wheaton, 421.
Caldwell vs. Carrington, 9 Peters, 86.
Langdon vs. Woodcock, 2 B. Monroe. 105.

The taking of a legal estate after notice of a prior right makes a person a *mala-fide* purchaser, and not, that he is not a purchaser for a valuable consideration in every other respect. This is a species of fraud and *dolus malus* itself; for he knew the first purchaser had the clear right of the estate.

1 Story Eq. Jur. pg. 425.

The recording act applies only to parties who have acted with good faith, and cannot be made the means of fraud and oppression.

R. S. Ills., pg. 159, Sec. 23.

Unrecorded deeds are good against subsequent conveyances recorded when notice *or fraud* is shown to have existed.

When a person does not stop his hand but gets the legal estate when he knows the equity was in another, he is guilty of a fraud. Courts have repeatedly said, that fraud shall not be permitted to prevail.

When a subsequent deed of land is obtained by false representations and by trick, as in this case, by Lombard, how

much more forcibly will the rule of law apply over an ordinary case of notice. When such a deed is shown claiming title, no purchaser of the fraudulent grantee with notice of the prior right and title, can protect himself under his deed.

Fraud and deception will vitiate any transaction and turn it to a mere colour.

Suyden on Vendors, vol. 2, pg. 321.

Courts of law will take cognizance of direct frauds, and not turn a party over to a Court of Equity for relief.

Supreme Court of the United States.

December Term, A. D. 1868.

JOSIAH M. MILLS AND WIFE,

vs.

NATHANIEL SMITH.

Appeal from the Northern Dist. of Ill's.

BRIEF of H. M. WEAD, of PEORIA, ILL.,

FOR DEFENDANT.

This is an action of ejectment, brought in the Circuit Court of the United States, for the Northern District of Illinois, to recover a half section of land situate in the County of Stark, in said State.

The plaintiffs claim title in Flora M. Mills, the wife of Josiah M. Mills, formerly the wife of Edwin A. Lacy, to whom it is alleged the land in controversy was deeded.

The plaintiffs, on the trial in the Court below, introduced the following evidence:

1st. Patent from the United States to Ziba Parmily, 9th July, 1818.

2d. Quit Claim Deed from Ziba Parmely to Edwin A. Lacy, 11th February, 1837,—which last mentioned Deed had never been recorded.

3d. Deed from Ziba Parmelee to Andrew A. Lacy, son and *only heir-at-law* of Edwin A. Lacy, deceased, dated 14th Nov., 1854, and recorded in Stark County Nov. 25th, 1854.

This deed recites that the land was sold by Parmelee to Edwin A. Lacy about the 1st of October, A. D. 1835, and that "*no deed of conveyance was ever executed "by me to the said Edwin A. Lacey for the tract of land "above described.*" Also in connection with the Deed the second deposition of Ziba Parmelee taken August 12, 1864.

4th. Will of Andrew H. Lacey, son of Edwin A. Lacey and Flora M. Mills, devising the land to her, dated 22d Sept., 1855.

5th. The plaintiff also introduced the depositions of Ziba Parmely, Bryant, Smith and Flora M. Mills.

The deposition of Ziba Parmely introduced by plaintiff was taken on the 12*th of August*, 1864, before Nelson Taylor, Esq., Commissioner. (See Record, pages 14 and 15.)

DEFENSE.

The defendant then introduced:

1st. A Deed from Ziba Parmely to James Lombard, dated 14th August, 1854. Recorded in Stark County,

Ill., August 28th, 1854. Also an affidavit on the back of said Deed signed by Ziba Parmely, proving his identity, "and that the Deed he has this day given for "his bounty land claim is the only Deed ever given by "him for said claim whatsoever," which statement was sworn to on the same 14th day of August, 1854, before David B. Beers, Justice of the Peace and Notary Public. (See Transcript of Record, page 26.)

2d. Deed from James Lombard and Mary A. Lombard, his wife, to Nathaniel Smith, defendant, dated 7th Dec., 1855. Recorded Oct. 12, 1858.

3d. Deposition of Benjamin Lombard, taken 16th April, 1861. Record page 27–30.

4th. First Deposition of Ziba Parmely taken 20th April, 1861.

In this deposition Parmely swears "that *he told Lom-* "*bard that he had never given a Deed to any one for the* "*land.*"

Here the defense rested.

The *Plaintiffs* then gave in evidence a part of the answer of Nathaniel Smith, defendant, to a Bill of Discovery in Chancery in the same Court, wherein Josiah M. Mills and Flora M. Mills were complainants, and James Lombard and Nathaniel Smith were defendants, as follows: "Having seen that the Deed from the "patentee to James Lombard was made and recorded "prior to any other pretended conveyances, he was ad- "vised by counsel, and believed the same true, that he "was procuring a perfect and equitable title to the "land." Record page 33.

The plaintiffs next offered the deposition of David B. Beers, accompanied with the Deed from Ziba Parmely to James Lombard and the affidavits thereto attached. Record pages 34–36.

The plaintiffs then called Emery A. Storrs as a witness, who testified that he was counsel for plaintiff when the case was first tried at the July term, 1862, of this Court; the Deed from Ziba Parmely to Edwin A. Lacy, dated 11th February, 1837, was introduced in evidence by Judge Purple, the counsel for defendant, "*and that "was the first that the plaintiff's counsel had seen of "that Deed, on the trial.*"

Here plaintiff rested again.

Defendant then called Nathaniel Smith, (defendant,) who testified as follows: "*After this suit had been com-"menced,* (the suit was commenced on the 19*th January*, "*A. D.* 1861,) I was informed by Geo. C. Bestor that "he had seen a deed for the land from the patentee to "some one; and that inquiry was made for the Deed, "and, as I understood from my counsel, Mr. Purple, the "Deed was found with Mr. Kingman, of Quincy." Record page 37.

And to show how he came to know of the existence of the Deed, defendant introduced the following letter from O. H. Browning, of Quincy, Ill., to E. S. Smith, Esq., the counsel for plaintiffs in this case:

"QUINCY, Nov. 18, 1863.

"E. S. SMITH, Esq., Chicago, Ill.:

"Dear Sir: There has been some delay in seeing "Mr. Kingman, but he gives his consent without hesita-"tion that you may use the deed as you desire; that is,

"have it filed in Court and sent out with Dedimus. Mr.
"Kingman found the Deed among the papers of the old
"Illinois Land Company. How it came there, he has
"no personal knowledge. There was no connecting
"chain of title. Yours Truly,

"O. H. BROWNING."

The defendant then read in evidence the answer of Nathaniel Smith to a Bill in Chancery, filed in this Court by Josiah M. Mills and wife *vs.* James Lombard and Nathaniel Smith. Record page 38.

In this answer defendant denies all knowledge of the conveyance of the land by Ziba Parmelee to Edwin A. Lacey; denies any sale from Parmelee to Lacy, and insists if there was one, it was not in writing, and was therefore null and void by reason of the Statute of Frauds of Illinois, which requires that all agreements of and concerning lands or any interest therein shall be in writing and signed by the parties. He also denies all knowledge of the Deed from Ziba Parmelee to *Andrew* H. Lacy of the 14th Nov., 1854, and the recitals therein. He further states that he purchased the land in good faith, believing he was obtaining a good title. "*He was further induced to purchase* the land by "the affidavit of Ziba Parmalee attached to the Deed "made by him to James Lombard," which Deed and affidavit are made exhibits. Record pages 38–41.

Defendant then offered his amended answer in the Chancery case, (See Record, page 43,) which was properly sworn to, as follows: "That at the time he pur-"chased the land in controversy of James Lombard, "and at the time of the conveyance to him by Lombard, "he had no knowledge, information or belief whatever "that the said Ziba Parmely had ever made previously

"thereto any sale, deed or conveyance whatever, or "contract therefor of said land to Edwin A. Lacey, or "to any other person; and he explicitly denies that, at "the time of his purchase, he had any knowledge, in- "formation or belief of the alledged deed from Ziba "Parmely to Andrew H. Lacey dated 14th Nov 1854, "as stated and set forth in Complainant's Bill."

The defendant was then placed on the stand, and swore to the same facts.

On cross-examination he is erroneously reported to have testified that, after he had purchased of Lombard, and after he had taken possession and made his first payment, he heard of the deed from Ziba Parmely to Andrew H. Lacey of the 14th Nov., 1854, and being anxious to know about it, went to Toulon, the County Seat of Stark County, (in which County the land was situate,) and found the deed on record.

He also again denied that he had notice of the Deed to Andrew H. Lacey from Parmalee until long after his purchase.

This was substantially the proof upon both sides, and on these proofs arise several questions, and

I.

The deed from Ziba Parmely to Edwin A. Lacey, dated 11th February, 1837, was never heard of by any of the parties to this suit until it was discovered by Mr. Kingman, among the land papers in his possession, long after the commencement of this suit, and long after the purchase by Lombard from Parmely, and of Smith, the defendant, from Lombard. The question arises, to what extent innocent purchasers were bound by this unknown deed, which had never been recorded.

The Recording Laws of Illinois in force at the time the deed from Ziba Parmely to Edwin H. Lacey, 11th Nov., 1837, was executed required that all deeds and conveyances of land lying in that State should be recorded within *twelve months* after the execution of the writing. (See Revised Laws of 1833, page 135, sec. 15, "Conveyances.") And said section further provides as follows: "Every such writing that shall, at any time after the "publication hereof, remain more than twelve months "after the making of such writing and shall not be proved "and recorded as aforesaid, shall be adjudged fraudulent "and void against any subsequent bona fide purchaser "or mortgagee for valuable consideration, unless such "deed or conveyance, or other writing, be recorded as "aforesaid, before the proving and the recording of the "deed, mortgage or writing under which any such sub-"sequent purchaser or mortgagee shall claim."

The manifest object and purpose of this provision was to compel persons having conveyances of lands in Illinois to *record* the same within twelve months. Such conveyances, if not recorded within that period, are declared *void and fraudulent* as against *bonafide* purchasers or mortgagees. What is meant by *bona fide* purchasers?

The Statute does not declare that the first conveyance shall be void as against subsequent purchasers *without notice*, as most statutes do; but it enacts that such prior conveyance shall be *fraudulent and void* as against subsequent bona fide purchasers and mortgagees. Another Statute of Illinois in force at the time does make all deeds void as against subsequent purchasers, without notice, until the same are recorded. (Revised Statutes of 1833, page 587.)

A purchaser in good faith is one who pays his money believing he is getting a good title. Did Lombard believe he was getting a good title when he purchased of Parmely in 1854? What are the facts?

1st. He enquired of Parmely if he had ever conveyed the land before, and Parmalee assured him he had not.

2d. Parmalee made oath that he had not conveyed the land before.

3d. Lombard paid over his money to Parmalee, thus showing his belief that he was getting a good title.

4th. At the time of this conveyance no one seems to have known of the existence of the deed of 11th Feb., 1837, from Parmalee to Edwin A. Lacey.

The deed from Ziba Parmalee to Andrew H. Lacey of the 14th Nov., 1854, (which was just three months after the date of the conveyance to Lombard,) recites that *no conveyance or deed* had ever been made to Edwin A. Lacey by Parmalee. It thus appears that neither Parmalee nor any of the Laceys knew of the existence of the deed of 1837 from Parmalee to Edwin A. Lacey. If the parties in interest did not know of the existence of the deed, surely Lombard had no cause to suspect its existence, especially after the oath of Parmalee that he had never conveyed it.

6th. The deed of 11th Feb., 1837, from Parmalee to Edwin A. Lacey was discovered by Mr. Kingman, of Quincy, Ill., among the papers of the Illinois Land Company, long after the commencement of this suit, and up to that time its existence was not only unknown but unsuspected.

How could Benjamin Lombard, Jr., the agent of James Lombard, to whom the deed was conveyed, suspect, or guess, or imagine, *under these circumstances*, that any prior conveyance had ever been made?

Benjamin Lombard, Jr., testifies (Record pages 28 and 29) that he purchased the land of Ziba Parmalee for James Lombard. He found Parmalee (14th Aug., 1854,) in a hay field in Newtown, Mass.; that Parmalee stated to him his land *had been sold for taxes*, and showed him a letter from parties in New York saying his land was sold for taxes and was past redemption, and that the land would be quite *valuable to him* (Parmalee) had he not lost it through tax sales. He also stated that he had never given a deed, power of attorney, or other instrument of writing for the sale or conveyance of said land; that he talked of selling it to a doctor near him; that the doctor was to give him a cow or horse, which proved worthless and not as represented, and that he refused to give any deed to the doctor for the land, for the reason he never received any pay, and the trade had fallen through on account of the doctor not doing as he agreed; that a son or relative of the said doctor had since been to him to get a deed for said premises, but he would not give it, for the reason he never received pay and the trade had fallen through; and said Parmalee frequently repeated that he had never given a deed, power of attorney or any other kind of conveyance; and he made affidavit of this fact before D. B. Beers, a Notary and Justice of the Peace, which affidavit appears in full on the back of the deed from Parmalee to Lombard. (See Record, page 26.)

This, then, is what Parmalee told Benjamin Lombard when he obtained the deed on the 14th August, 1854.

But Parmalee, in his two depositions, tells a different tale. Let us examine those depositions and see what they do contain.

1st. The *first* deposition was taken 20th April, 1861. It was introduced by defendant, and may be found on pages 30, 31 and 32 of the record, and is there called "the first deposition of Ziba Parmalee."

2d. The *second* deposition was taken 12th August, 1864, and was introduced by Plaintiffs. See Record, pages 14, 15 and 16.

The deposition of Parmalee taken in 1864 was read by the plaintiffs in support of their title, and contradicts, in almost every particular, the one made in 1861, called "the *first* deposition."

In the deposition of 1864, Parmalee says he is 72 years of age; that he did execute the deed marked "Exhibit A," and delivered it to Edwin A. Lacey, the person named in the deed. And, in answer to the 6th Interrogatory, he says: "I remember of giving to Ed-"win A. Lacey a deed of my land in Illinois, and "when I testified before, I had forgotten giving more "than *one* paper to Mr. Lacy. I did recollect that I "gave him the Patent that I received from the govern-"ment for the land, and thought then that may have "been all I gave him. I did not at that time recall to "my mind, *from the lapse of time*, the circumstances; "and, besides, it was represented to me some time pre-"vious by a man calling himself *Lombard*, that there "was no deed on record from me to Lacey."

Now let us turn to the deposition made by this same man in 1861 and see how his statements *then* agree with his statements *now*. In answer to the 11th Cross-Interrogatory (page 33); "My memory is very good and my recollection as good and reliable as ever."

In answer to the fifth direct interrogatory—page 31—he says: I gave to Edwin A. Lacey the *Warrant* I got from the United States Government. And in answer to the 8th direct interrogatory—page 31—he says that when Lombard called on him to purchase, "I told him I had disposed of it to Edwin A. Lacey, but had never given any deed." Excellent memory! When the deed was produced, he owned up; but until then he could not recollect it—he had only passed over to Lacey the warrant he had obtained from the government.

In 1861, when called upon for a full and complete account of his interview with Lombard in 1854, he remembered distinctly that he told Lombard that he had never given any deed, but he did not state then "*that "he did not recall the circumstances from lapse of time, "or because Lombard told him there was no deed on rec- "ord from him to Lacy.*" *Oh, no!* But the reason is of a different nature, wholly. It is this; (see answer to 2d Cross-Int. page 32): "*I supposed when I gave the* WARRANT *to Edwin A. Lacey, that he did not want a deed, as he never mentioned anything about a deed or asked for a deed at that time.*" This was his reason, in 1861, when he swore his recollection was good and reliable as ever, why he did *not* give a deed; but in 1864, when a new deposition was taken, his reason had changed entirely, and then he swears he was informed by Lombard there was no deed on record from him to Lacey. Verily, this man's stories do not harmonize.

He remembers distinctly, in 1861, that the reason why he did not give a deed was because Lacey *did not want one!*

In answer to the 4th Cross-Interrogatory, (page 32,) he says: "I never told any person at any time that I "had never sold or conveyed the land;" and yet, in reply to the next Cross-Interrogatory (page 33) he says: "*I* "*did tell* Lombard that I had never given a deed to "any one for the land." Is it not obvious, from all this, that the testimony of Parmalee was wholly worthless?

But suppose it was not, what then? He continually insists that he told Lombard he had not deeded the land to Lacey; so there is no possible excuse for insisting that Lombard had any notice of any prior conveyance. Besides, in the deed of confirmation from Ziba Parmalee to Andrew H. Lacey introduced by plaintiffs, of the date of 14th November, 1854, it is distinctly alledged and set forth "that the land was sold by Parmalee to Edwin A. Lacey about the 1st October, A. D. 1835, and that "no deed of conveyance has ever been "executed by me to Edwin A. Lacey for the tract of "land above conveyed."

But a deed from Parmalee to Andrew H. Lacey had been made, executed and delivered.

The *agreement* to deed had been fulfilled and its force expended. It had expired when the deed was made; it was absorbed, annulled, cancelled, and no longer in existence. Notice of the *sale* to Lombard was therefore useless, and could avail nothing. If Lacey, or the Plaintiff, had any claim to the land, it was by virtue of this very conveyance obtained by him from Parmalee on the 11th day of February, 1837.

THIS DEED NEVER WAS RECORDED; nor

was *its existence known until long after the commencement of this suit.* If Lacey had any claim whatever, it was by virtue of this Deed, and not by virtue of the *agreement* to sell, because the *agreement* had been fulfilled; the conveyance had been made and was deposited in his pocket instead of the office of the Recorder, where the law required it to be recorded.

It was decided at a very early day in Illinois that, "as a general rule, the deed first recorded must prevail "over one of older execution, when made in good faith, "and when it appears to have been the intention of the "parties to convey again the same land which had been "conveyed."

McConnel vs. Reed, 4 Scammon Rep. 123.
Butterfield vs. Smith, 11 Illinois Rep. 485.
Choten vs. Jones, 11 Illinois, 323.
Rogers vs. Riley, 14th Illinois, 66.

There was another Statute in force in Illinois requiring deeds to be recorded when the deed of 1837 was executed, as follows:

(See Revised Statutes of 1833, page 587, title "State Recorder," Sections 2 and 5. In force June 1st, 1833.)

SEC. 2. "That, after the first day of June next, all "deeds and title papers of whatever description for "lands lying in this State, whether owned by residents "or non-residents, shall be recorded in the County where "the lands are situate."

SEC. 5. "That, from and after the first day of August "next, all deeds and other title papers which are re-"quired to be recorded, shall take effect and be in force "from and after the filing the same for record, and not "before, *as to all subsequent purchasers without notice,*

"*and all such deeds and title papers shall be adjudged* "void as to all such creditors and subsequent purchasers "without notice, until the same shall be filed for record "in the County where the lands may be."

Under these Statutes it was the duty of Lacey to place his deed upon record, so as to notify others of his claim; and if he failed to do so, he must abide the consequences. It is clear that Lombard had no notice of this Deed when he purchased of Lacey.

II

It is pretended, however, that Parmalee told Benjamin Lombard, he had sold the land to Edwin A. Lacey, but had not conveyed it. This is denied by Lombard in his deposition. It was for the Jury to decide which was entitled to belief; and having disposed of that question, (if such a question could arise,) it is no longer an open question. But this question did not and could not arise, because,

1st. The agreement had been filled and cancelled by the making of the deed, and was no longer in existence.

2d. The deed having been made, the agreement was no longer valid or binding upon any one.

3d. If there ever was an agreement, it was a parol agreement not reduced to writing, and therefore void.

The Statutes of Illinois in force in 1837 required that all agreements of and concerning lands or any interest therein, for a longer term than one year, should be in writing and signed by the parties. The agreement of Parmalee with Edwin A. Lacey to sell the land

was not in writing, nor was it to be performed within one year. Benjamin Lombard swears distinctly that Parmalee told him the trade had fallen through, and that he (Parmalee) refused to deed to Lacey. Whether the story told by Lombard was correct or not was for the Jury to decide. No reliance could well be placed upon the testimony of Parmalee, for the reasons hereinbefore set forth; and it is not surprising that the Jury should decline to give it credence. If any agreement by Parmalee to sell to Edwin A. Lacey had been made, it was not in writing, nor had it been made within a period of time sufficiently recent to be enforced in any Court, either at law or equity. Parmalee in his deed to Andrew H. Lacey, says he sold the land to Edwin A. Lacey "about the 1st October, 1835." The Deed from Parmalee to James Lombard bears date August 14th, 1854, which would make about nineteen years between the dates of the two deeds. It clearly would not be a wise policy to encourage such stale equities, or to justify a violation of the recording laws.

III.

Had Nathaniel Smith notice of the Deed from Ziba Parmalee to Edwin A. Lacey of the 11th February, 1837, when he purchased of Lombard? The solution of this question is easy.

Mr. Smith, in his testimony (Record, page 43,) says that he purchased the land of Lombard one or two years before he got his deed; he thinks it was the same fall that Lombard purchased of Parmalee, and he paid $500 down and went into possession of the land. The deed from Parmalee to Andrew H. Lacey was dated the 14th Nov., 1854, and recorded on the 25th of the

same month. The deed from Parmalee to James Lombard was dated the 14th August, 1854, and was recorded on the 28th of August of the same year.

When the deed from Parmalee to Andrew H. Lacey was recorded, Smith was probably in possession of the premises, and had made valuable improvements thereon. All Smith could know about the title was that Parmalee had conveyed the land twice in one year to two different persons, even if he had seen the record. The first conveyance made was to Lombard, and this conveyance being on record, it was plain that Lacey could not again convey to any one, because he had parted with his title and had nothing to convey. But it is alledged there were recitals in the deed from Parmalee to Andrew H. Lacey of the 14th Nov., 1854, which in some way bound Smith. What recitals? These, "whereas, I, Ziba Parmalee, did, on or about "the 1st of Oct., 1835, bargain and sell unto Edwin A. "Lacey (the land in controversy) for the sum of thirty "dollars; and in further consideration that no deed of "conveyance was ever executed by me to the said Ed- "win A. Lacey for the tract of land above described, "now, therefore, I convey the same to Andrew H. "Lacey, the son and only heir of Edwin A. Lacey."

All these recitals were absolutely false. The sale was not about the first of October, 1835,—it was on the 11th of February, 1837, more than 16 months afterwards. And the statement that no deed was ever executed is refuted by the production of the deed of the 11th Feb., 1837, in Court.

It must be remembered that when this remarkable recital was placed on record, Smith had already purchased and was in the actual possession of the land. If

this deed was not on record when Smith purchased, the pretence that he had notice falls to the ground.

But are these recitals notice? Can a vendor sell and convey his land, then convey it a second time to another person, and put recitals in his last deed which shall deprive the first vendee of his purchase? The *recitals* were not only false in fact, but amounted to nothing as notice. As well might any other statement of the vendor be placed on record as notice. By our recording laws nothing is notice but *the conveyance* itself; not such other matters as parties may choose to insert in it. These *statements* were not entitled to go upon the record —and not being so, were not notice.

St. John vs. Conger, 40th Ill. Rep., 535.
Long vs. Dollarhide, 24th California, 218.

But suppose we admit that the recitals were properly in the deed and on the record, what do they amount to?

The recital is, that Parmalee had sold the land about the 1st October, 1836, to Edwin A. Lacey, but had never Deeded it!

This was tantamount to saying to Smith: "Your ti-
"tle is all right. The original sale to Edwin A. Lacey
"never was consummated until after the conveyance by
"Parmalee to Lombard; and the deed from Parmalee
"to James Lombard was in point of fact the first deed
"ever made, the first deed ever recorded, and as you
"purchased of Lombard, you have nothing to fear."

The recitals are also an admission too strong to be controverted, that Lombard never had notice of any prior conveyance from Parmalee to Edwin A. Lacey.

IV.

If either Lombard or Smith were innocent purchasers, then Smith is to be protected. And no one can read the evidence and fail to arrive at the conclusion that neither had notice of the prior conveyance to Andrew A. Lacey, because the existence of that conveyance was not known until long after the commencement of this suit!

St. John vs. Conger, 40th Ill. Rep., 535.

It is well settled in England and in this country that if a person purchase for a valuable consideration with notice, he may shelter himself under the first purchaser.

Leading cases in Equity by Hare & Wallace, pages 50 and 99, and cases there cited.

Lowther vs. Carlton, 2 Atkins, 242.
Alexander vs. Pendleton, 8 Peters, 462.
Boone vs. Chilles, 10 Peters, 177.
Dana vs. Newhill, 13 Mass., 498.
Trull vs. Bigelow, 16 Mass., 406.
Bell vs. Twilight, 18 New Hampshire, 159.
Varick vs. Briggs, 6 Paige, 323.
Pierce vs. Faunce, 47 Maine, 507.
Suiter vs. Turner, 10 Iowa, (2 With,) 517.
Willis & al vs. Henderson, 4 Scammon, 19.

Wm. Reed